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Brief of Respondent Water Power Co.

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Counsel for Plaintiff in Error.

SUPREME COURT,

OF THE

UNITED STATES.

THE SKANEATELES WATER WORKS COMPANY,

Plaintiff in Error.

against

THE VILLAGE OF SKANEATELES, E. NORMAN LESLIE as President of said Village; JOHN CONNELL, EDWIN WHITING, EDWARD DENT, as Trustees of said Village, and LEMUEL D. HALL, EDWARD ECKETT, JAMES A. ROOT and JOHN L. SHULTZ, as Water Commissioners of the Village of Skaneateles,

Defendants in Error.

STATEMENT OF CASE

(Rule 21.)

This was an action begun in the Supreme Court of the State of New York by the service of a summons and complaint Oct. 29th, 1896. Issue was joined by the

service of an answer Nov. 20, 1896. The issues were referred to one John W. Hogan, Referee, to hear, try and determine. Subsequently a trial was had before the said Referee and the said Referee thereafter made his report and decision, found at pages 92, *et seq.*, of the record.

Subsequently upon the findings and conclusions of the referee, judgment was duly entered in the said Supreme Court of the State of New York, dismissing the complaint with costs. (Record, page 96).

The plaintiff having, in the meantime, duly excepted to the Referee's conclusions of law (record 95, *et seq.*) appealed from such judgment to the Appellate Division of the Supreme Court of the State of New York, Fourth Department, in which Court the said judgment was affirmed, (record 98) and judgment of affirmance was entered in the proper office Oct. 7, 1898.

No opinion was written by said Appellate Division, (record page 100) except as the same appears in the decision, (record 98).

From such judgment of affirmance an appeal was duly taken to the Court of Appeals of the State of New York (record 99) which was subsequently argued in said Court and was therein decided December 5th, 1899. Said Court of Appeals affirmed the said judgment of the said Appellate Division of the Supreme Court (record 112, 113) and duly remitted the record into the said Supreme Court of the State of New York according to the form of the statutes of the said State

of New York, to be enforced according to law, (record 113).

Thereafter at a term of the said Supreme Court of the State of New York held at the City of Syracuse, N. Y., on Dec. 9, 1899, upon the remittitur aforesaid,—the aforesaid judgment of the said Supreme Court of the State of New York was duly affirmed with costs, (record 114) to which court the writ of error herein was thereafter issued (record 121), the same having been allowed by the Honorable Alton B. Parker, chief Judge of the Court of Appeals of the State of New York, (record 116). The writ of error herein is printed at page 121 of the record.

The action was brought to obtain a permanent injunction against the defendants. A temporary injunction was obtained with an order directing defendants to show cause why the same should not continue in full force until final judgment. The act sought to be enjoined was the construction and operation by the Village of Skaneateles of an independent system of water works for supplying itself and its inhabitants with water. At the time of the commencement of the action, the village had issued no bonds, and had expended no money in such construction, but was taking the preliminary steps looking to the construction of such a plant and its operation.

The Court after hearing the arguments of counsel, denied the application for an injunction, and the defend-

ants thereafter, at once, proceeded with the construction of its plant and subsequently completed it.

The facts found by the referee before whom the action was tried, to which neither the plaintiff nor defendants filed any exceptions, appear in the record, page 92, *et seq.* but for the convenience of the Court, are here restated as follows:

"1. That the plaintiff at the several times mentioned and referred to in the complaint in this action was and still is a domestic corporation, organized pursuant to the provisions of Chapter 737 of the Laws of 1873, and the Acts amendatory of the same and supplemental thereto.

2. The defendant, the Village of Skaneateles, is a municipal corporation; the defendant, E. Norman Leslie, is the president of said village, and the defendants, John Connell, Edward Whiting and Edward Dent were at the time of the commencement of this action trustees of said village.

3. That on or about April 5th, 1887, the defendant, the Village of Skaneateles, granted a franchise to the plaintiff herein to maintain and operate within the Village of Skaneateles a system of water works for furnishing to said village and its inhabitants pure and wholesome water, upon certain terms and conditions therein referred to, namely:

That the said company should have its works in general operation within said village within two years from the 1st day of December, 1887.

That said company should not charge or collect from said village at any time a greater sum than $40.00 per annum for each hydrant furnished for the use of said village, *and that at that rate should furnish all hydrants required by said village at such places as should be designated by its trustees.*

That the rights conferred should not be sold or transferred to non-residents of the Village of Skaneateles.

4. The Village of Skaneateles, by resolution of its board of trustees, at a meeting regularly and duly held thereafter renewed the franchise theretofore granted to said plaintiff, and extended the time for the completion of the work by said plaintiff of its plant until December 1st, 1890.

5. That in or about the year 1889, the plaintiff constructed under and in pursuance of the power so granted, a system of water works for supplying the Village of Skaneateles and its inhabitants with pure and wholesome water.

Prior to that time the Village of Skaneateles was not supplied with water by any company or corporation, nor did it possess any system of its own.

That the system of water works so constructed and completed as aforesaid, by plaintiff, *was and at all times since has been and now is a complete and adequate system. Said corporation has laid pipes in substantially every street of said village, no complaint has been made that the water furnished by said plaintiff has not been pure and wholesome, or that the sufficiency thereof has not been adequate, or that the pressure thereof has not been adequate for fire protection and all other purposes.*

That the source from which said corporation procures its water is Skaneateles lake, which is the only source from which water can be obtained for supplying and furnishing the village and its inhabitants with pure and wholesome water, thus far discovered.

6. That the plaintiff has encumbered its property by two several mortgages, one to secure the payment of $40,000 worth of bonds, executed about the 22nd day of August, 1890; and the other executed about the first day of February, 1895, to secure the payment of $10,000 worth of bonds issued by said company, which said bonds and mortgages securing the same, are now outstanding against the plaintiff herein.

7. That on or about the 1st day of February, 1891, a contract was entered into between the plaintiff and

the Village of Skaneateles, whereby the plaintiff undertook with said village to supply the water for forty (40) hydrants in said village and for other purposes, for the sum of $30 each per annum; that said contract expired on the 1st day of February, 1896, and was not renewed.

8. That prior to said special election and after the publication of the notice thereof, the plaintiff herein offered to renew the contract with the Village of Skaneateles for hydrant rentals according to the price regulated in the first contract, at $40 per hydrant per annum for five years, and at $30 per hydrant per annum for a term of years thereafter.

9. That without any proceedings to vacate or annul the franchise of the plaintiff, or to dissolve the corporation, the defendant, Leslie, as president of the Village of Skaneateles, did, on or about the 21st of March, 1896, appoint the defendants, Hall, Eckett, Root and Shultz, to be water commissioners of the said village, having in contemplation the purpose of constructing for said village a water works system of its own.

That the said persons so appointed as water commissioners entered upon the performance of their duties, and have been acting as such. The appointment was confirmed by the trustees of said village, and the said water commissioners having duly qualified, caused a meeting of the electors of the village to be called by the trustees of the village in pursuance of the provisions of Chapter 181 of the Laws of 1875, and a vote was taken at said meeting, the result of which was favorable to municipal ownership, and after said election the said water commissioners issued or caused to be issued bonds of said village to the amount of $30,000, and sold the same for par and accrued interest.

10. That said Board of Water Commissioners of the said Village of Skaneateles entered into a contract for the construction of a water works system for said village, and have expended thereon about the sum of $24,000, and said works are substantially completed.

11. That all of the proceedings were taken without instituting any proceedings to condemn the property of

the plaintiff herein, although the plaintiff offered to participate in a proceeding looking towards the condemnation of its property.

12. That the works of the plaintiff were constructed at a large expense, and its property rights and franchise mortgaged to secure its bonds duly issued, and the income of the plaintiff from the operation of its plant has at various times been insufficient to meet its outgoing expenses, and will be insufficient to meet its outgoing expenses when it shall cease to furnish water to the Village of Skaneateles."

The referee found as conclusions of law as follows:

"1. The Village of Skaneateles was not required to institute proceedings to condemn the property of the plaintiff before commencing the construction of a water works system for the use of said village.

2. The consent of the Village of Skaneateles to the organization of the plaintiff as a water works company, and the making of a contract by the Village of Skaneateles with the plaintiff for the supply of pure and wholesome water, did not vest in plaintiff the exclusive right to furnish said village with water, or prevent the village from granting to another corporation the right to supply water within said village or the village from constructing and maintaining a water works system to supply itself with water.

3. Subsequent to February 1st, 1896, no contractual relations existed between the plaintiff and the Village of Skaneateles, and the village was not under legal obligation to enter into any contract with the plaintiff after that date, or to continue to take water from the plaintiff; but was entitled to construct and maintain a water works system of its own.

4. The defendants are entitled to judgment herein dismissing the complaint upon the merits with costs, and judgment is ordered accordingly."

To the conclusions of law the plaintiff duly excepted (record 95).

The questions to be reviewed, therefore, are questions of law only upon settled facts; the facts found by the referee.

The following is a specification of the errors relied upon herein namely:

(2.)

"1. The Court erred in holding and deciding that the plaintiff was not entitled to the remedy and relief asked for and sought in its complaint and in affirming the judgment of the Supreme Court of the State of New York, denying to the plaintiff the relief demanded in its complaint and dismissing the plaintiff's complaint.

II. The Court erred in not ordering and adjudging that the judgment of the Supreme Court of the State of New York dismissing the complaint be reversed and that the relief demanded by such complaint be granted, and the defendants restrained by injunction from the performance of the acts complained of.

III. The Court erred in denying to the plaintiff the rights claimed by it under Section 10 of Article I of the Constitution of the United States, and in denying to it any relief on that ground.

IV. The Court erred in not holding and adjudging that the acts of defendants sought to be restrained were contrary to the provisions of Section 10, of Article I, of the Constitution of the United States, securing to the plaintiff the validity and obligation of its contracts made with the defendants under the laws of the State of New York.

V. The Court erred in denying to the plaintiff the rights claimed to be secured to it under Section 1, of

the fourteenth amendment to the Constitution of the United States, and in denying to the plaintiff any relief on that ground.

VI. The Court erred in not holding and adjudging that the acts of the defendants sought to be restrained were contrary to the provisions of said fourteenth amendment to the Constitution of the United States, securing to the plaintiff the equal protection of the laws and denying to the State of New York the right to deprive plaintiff of its property under any statute of its Legislature without due process of law.

VII. The Court erred in not holding and that the acts of the defendants sought to be restrained were contrary to the provisions of Article V, of the amendments to the Constitution of the United States, providing that no person shall be deprived of his property without due process of law, and that private property shall not be taken for a public use without just compensation.

VIII. The Court erred in deciding in favor of the validity of the statutes of the State of New York and the authority exercised under such statutes by the defendants pursuant to which the acts complained of were performed by the defendants, notwithstanding the fact that their validity was drawn in question, on the ground of their being repugnant to the Constitution of the United States."

In the complaint herein (folio 179, page 85 of record), are the allegations that the acts sought to be enjoined are "in violation of the provisions of Section 10, of Article I, of the Constitution of the United States, and of Section 6, of Article I, of the Constitution of the State of New York," and that such "acts, as against the plaintiff, are in violation of law, inequitable and wholly unauthorized."

The opinion of the Court of Appeals of the State of

New York herein is found at page 101 of the record; the dissenting opinion at page 109. The case is reported in 161 N. Y. Reports, 154.

A reference to the case as reported shows what questions were raised and passed upon by the said Court of Appeals.

The following is a printed copy of a certificate duly filed with the Clerk of this Court, a copy of which was on the 30th day of October, 1901, duly served upon the defendant's attorney herein, namely:

"STATE OF NEW YORK—Court of Appeals.

The Skaneateles Water Works Company, Appellant, vs. The Village of Skaneateles, E. Norman Leslie as President of said Village et al., Respondents.

I, Alton B. Parker, Chief Judge of the Court of Appeals of the tSate of New York, do certify that upon the argument of the appeal in this cause, the appellant submitted, among other propositions set forth in its brief the following:

"I. The village under the delegated authority of the Legislature having granted to the private company its particular franchise, under which it was authorized to enter into contractual relations with the village and the village with it, and under which it engaged on its part to supply the village and its inhabitants with water, the act of the Legislature conferring power thereafter upon the village to render itself the precise service to render which it had agreed with the company, not only that it might render, but should render, (if such power was in fact conferred upon the village) was an act of the Legislature, impairing the obligation of a contract, violative of the Federal Constitution in that respect.

II. The act, Chapter 181, Laws of 1875, insofar as it

authorizes a village to construct, maintain and operate a system of water works of its own, after it had granted to a private company a franchise to perform that service for it, such franchise having been accepted by the company, which by virtue thereof has acquired the necessary property to render the service, which service is being actually rendered—is unconstitutional and void in that it authorizes the taking of private property for a public use without compensation.

III. The Act of 1875 (Chap. 181) insofar as it authorizes a village to do what the Village of Skaneateles has done in this case is unconstitutional and void in that it violates that provision of the Constitution which declares that no person shall be deprived of his property without due process of law.

IV. Any express reservation by the Legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished, indirectly would be equally ineffectual and void."

V. The Law of 1875, Chapter 181, insofar as it authorizes what has been done by the Village of Skaneateles in this case, is also violative of Article XIV of the Federal Constitution, which provides that "no State shall deny to any person within its jurisdiction the equal protection of the laws."

That said several propositions were discussed by counsel, were before the Court of Appeals aforesaid, herein, and were passed upon by said Court adversely to the contention of counsel for the appellants in relation thereto.

Dated October 29th, 1901.

ALTON B. PARKER,
Chief Judge of the Court of Appeals
of the State of New York."

Chapter 737, of the laws of 1873 of the State of New York, under which the plaintiff was organized and incorporated, is as follows:

"Section 1. Any number of persons not less than seven may hereafter organize in any town or village of this State a water works company, under the provisions of this act.

Sec. 2. Whenever any persons to the number of seven or more shall organize for the purpose of forming a water works company in any of the towns or villages in this State, they shall present to the town or village authorities an application, setting forth the persons who propose to form said company, the proposed capital stock thereof, the proposed number and character of the shares of such capital stock, and the name or names of the streams, ponds, springs, lakes or other sources and their locations, from which water is to be supplied. Such applications shall be signed by the persons who propose to form said company, and shall contain a request that the said town or village authorities shall consider the application of said company to supply said town or village of this State, or the inhabitants thereof, with pure and wholesome water. Upon the presentation of such application, the authorities of any town or village, which authorities are for the purposes of this act defined to consist for incorporated villages and towns, the board of trustees and supervisor, and for all other owns, the supervisor, justices of the peace, town clerk, and commissioner of highways. Said authorities shall within thirty days of the presentation of said application determine by a vote of a majority of the authorities of said town or village, whether said application shall be granted; and the authorities of any town or village in this State are hereby authorized and empowered to make such determination, and when the same shall be made, to sign a certificate to that effect, and immediately transmit the same to the person making such application or either of them. Duplicate certificates of such determination shall be filed in the office of the clerk of said town or village, and in the office of the County Clerk of the County in which said

town or village granting such application shall be situated. The persons named in such application shall thereupon meet and organize as a water works company under such corporate name as they may select. They shall file in the office of the Secretary of State a certificate of such organization. Said certificate shall contain the name of the corporation, the names of the members of said corporation and their residences, the amount of capital stock, the location of the office of said company. Such certificate shall be subscribed and sworn to by the president of said corporation, and shall be attested by the secretary thereof. Upon the filing of said certificate, said water works company shall be known and deemed a body corporate, and shall be capable of suing and being sued by the corporate name which they shall have selected, in any of the courts of this State. The capital stock of said company shall be paid in the manner and within the time provided by the "Act to authorize the formation of corporations for manufacturing, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, and the several amendments thereto, and the stockholders of said companies shall be personally liable for the debts of said companies in the same manner and to the same extent as is provided by said act and the amendments thereto.

Sec. 3. Said corporation shall have power to take and hold real estate for the purpose of their corporation, and may have, hold and occupy any of the waters of this State; provided, however, that nothing herein contained shall be deemed to infringe upon any private right which shall not have been the subject of an agreement and lease or purchase by said corporation. Provided, that said company shall have no power to take or use water from any of the canals of this State or any canal reservoirs as feeders or any streams which have been taken by the State for the purpose of supplying the canals with waters.

Sec. 4. Any corporation organized under the provisions of this act may, and they are hereby authorized and empowered to lay their water pipes in any streets

or avenues or public places, in any streets or avenues of an adjoining town or village, to the town or village where their application shall have been granted.

Sec. 5. Said corporations are authorized and empowered to supply the authorities or inhabitants of any town or village where they may have organized, with pure and wholesome water, at such rates and cost to consumers as they shall agree upon.

Sec. 6. Any person who shall maliciously or willfully destroy or injure any of the works or property of said company, or who shall maliciously or willfully do any act which shall injuriously affect or tend to affect the water of said company, shall be guilty of a misdemeanor, and may be punished by a fine or imprisonment, or both fine and imprisonment, in the discretion of the court, and shall also forfeit and pay to the company treble damages sustained thereby, to be recovered in any court having cognizance thereof, with costs."

By Chapter 566, Laws of 1890, of said State, it is further provided that every such corporation, "*shall* supply the authorities or any of the inhabitants of any city, town or village through which the conduits or mains of such corporation may pass with pure and wholesome water at reasonable rates and cost," and that contracts may be made therefor.

Chapter 181 of the Laws of 1875, of the State of New York (or so much thereof as is deemed necessary to a decision of this case) under the provisions of which the defendant Village, claims to have derived power to do and perform the acts sought to be enjoined in this action, as the same had been amended at the time of the grant by the Village to the plaintiff, was, as follows:

Section 1. The authorities of any incorporated village in this State may hereafter organize into a Board of Water Commissioners in the manner by this act provided.

Sec. 2. Provides for the constitution of such boards and the filling of vacancies therein.

Sec. 3. Provides for the organization of such board the election of officers, rules and special elections.

"Sec. 4. It shall be the duty of the commissioners to examine and consider all matters relating to supplying the village with pure and wholesome water, and for that purpose they shall have power to employ engineers, surveyors and such other persons as shall be necessary for that purpose; and they shall adopt such plans as in their opinion may be most feasible for procuring such supply of water, and which shall embrace proper distribution pipes and supplies for all streets and places where, in their opinion, it shall be of interest to the village, and shall ascertain the probable amount of money necessary to carry the same into effect; and for that purpose they shall have power to contract for and purchase, and take by deed or other instrument under seal, in the name of said village, all lands, tenements, hereditaments, rights or privileges whatever, and situate at any place within the county in which said village may be situated, which may be required for the purpose, and to contract for the execution of the work, or any part thereof, or the supply of any necessary material; and the commissioners, and their agents and employees, are authorized to enter upon any land or water for the purpose of making surveys, and to agree with the owner of the property, real or personal, which may be required for the purposes of this act, as to the amount of compensation to be paid such owner, subject to a revision by the court upon application by any three taxable inhabitants of the village."

Sec. 5. Provides for the exercise of the power of *eminent domain.*

Sec. 6. Provides the method of procedure for acquisition by condemnation.

Sec. 7. Relates to manner of perfecting title to property acquired.

"Sec. 8. The said commissioners shall have power,

and it shall be their duty, to borrow, from time to time, upon the credit of the village, a sum not exceeding ten per cent. of the assessed value of the real and personal estate of the valuation of the village, as shall appear by the then last assessment roll, upon such term of credit not exceeding thirty years, and at rate of interest not exceeding seven per cent. per annum, as shall seem to them for the best interests of said village; and to secure the payment of said loan said commissioners are authorized to make, execute and deliver bonds, certificates or other obligations, which shall be signed by them, or any three of them, as said commissioners; which said bonds, certificates or other obligations shall be made payable in such respective amounts, and at such respective times, as such commissioners shall deem best, and said bonds and the interest thereon shall be a valid liability against said village, and the credit of said village is pledged for the payment of the same; and the said money so borrowed shall be appropriated by said commissioners to supplying said village with water, agreeable with the provisions of this act. But no such bonds, certificates or other obligations shall be disposed of by such commissioners at less than the par value therefor."

Sec. 9. Provides for giving and filing bonds of commissioners.

Sec. 10. Authorizes commissioners to make contracts for constructing water works.

Sec. 11. Provides that commissioners shall not be interested in contracts.

"Sec. 12. The said commissioners, and all acting under their authority, shall have the right to use the ground or soil under any street, highway or roads within the county within which said village is situated, for the purpose of introducing water into and through any and all portions of said village, on condition that they shall cause the surface of such street, highway or road to be relaid and restored to its usual state, and all damages done thereto to be repaired, and such right shall

be continuous for the purpose of repairing and relaying water pipes, upon like conditions.'

"Sec. 13. The said commissioners shall establish a scale of rents to be charged and paid to the commissioners from time to time, either in advance or at such time and times, as the commissioners shall prescribe, for the supply of water, to be called 'water rents,' and appropriated to different classes of buildings in said village, in reference to their dimensions, values, exposure to fires, ordinary or extraordinary uses for dwellings, stores, shops, hotels, factories, livery stables, barns and all other buildings, establishments and trades, yards, number of families or occupants, or consumption of water as near as may be practicable, and from time to time, either modify, amend, increase or diminish such rents: and said commissioners and their respective employees shall be authorized at all times to enter into any building or place where water is used from supplying pipes, to examine as to the water, quantity of water used and the manner of using it."

Sec. 14 Provides that owners shall keep in repair connecting pipes.

"Sec. 15 The entire annual receipts for water rents after deducting therefrom such sums as may be necessary to defray the expenses of repairs of said water works, and of extending the same, and other necessary expenses, shall be applied toward the payment of the interest on the loan hereinbefore authorized, and also toward the creation of a sinking fund for the payment of the principal of said loan, as it shall from time to time become due and payable, which sinking fund shall be managed by said commissioners. No investment shall be made in behalf of such sinking fund, except in the bonds of the United States, of the State of New York, or of any city of this State, and in the bonds, certificates or other obligations authorized to be issued by such village under this act, which last named bonds, certificates and obligations, the commissioners may purchase at any time when they shall have funds applicable, at prices not exceeding their par value, and when so pur-

chased said bonds, certificates and obligations shall not be reissued but shall be immediately canceled."

"Sec. 16. In case the entire annual receipts for water rents, after deducting as in the preceding section provided, shall, in any year, not be sufficient to pay the interest for that year on said loans, or in case in any year when any of the principal of the loan secured by said bonds falls due, the amount of said receipts for water rents, after making said deduction, together with the sum in the said sinking fund, shall not be sufficient to pay said principal, and also the said interest falling due that year, it shall be the duty of the board of trustees of said village, and they are hereby directed to cause such deficiency to be assessed, levied and collected from the taxable property of said village at the same time and in the same manner as other expenses of said village are assessed, levied and collected, and the same shall be applied to the payment of such interest or principal, or both."

§ 17. Provides that commissioners shall annually report a statement of their account including a statement of any deficiency in water rents to meet their expenses, &c.

§ 18. Boards of Commissioners may sue and be sued.

§ 19. Provides that Commissioners may establish rules and regulations.

§ 20. Provides that violations of the act shall be a misdemeanor.

§ 21. Provides a method for submitting to the electors and voters of any village the question whether taxes shall be levied for installation by the village of a system of water works.

Sec. 22. Whenever any corporation shall have been organized under the laws of this State for the purpose of supplying the inhabitants of any village with water, and it shall become or be deemed necessary by the Board of water commissioners herein authorized to be created, that the rights, privileges, grants and properties of such

corporation shall be required for any of the purposes of this act, the commissioners herein authorized to be created shall have the power, and it shall be their duty, to make, or cause to be made, a thorough examination of the works, rights, privileges and properties owned or held by such corporations, or any of them, and if such commissioners shall determine that said works, rights, previleges and properties are necessary for the purposes of this act, they shall have the right to make application to the Supreme Court, at a special term thereof, held in the judicial district in which the works of such corporation are situated, for the appointment of three commissioners of appraisement, who shall be disinterested freeholders and residents of the county. Notice of such determination and application must be served upon the president and secretary of such corporation at least ten days prior to the presentation of any such application. The court shall thereupon appoint the said commissioners of appraisement, whose duty it shall be to examine and appraise the value of the works, rights, privileges and properties required to be taken by the board of water commissioners, and such commissioners of appraisement shall make a report in writing of such examination and appraisement to said court at a special term thereof. Said report shall be verified by the oaths of said commissioners; they shall file a copy thereof with the board of water commissioners, and they shall cause a copy thereof to be served upon the president or secretary of the company, whose rights and properties are the subject of such appraisement, with a notice of the time and place of the presentation of said report for confirmation. Such notice shall be served at least ten days prior to the time when said report shall be presented for confirmation. If objection be made to the confirmation of said report, by said company, or by a water commissioner, or if objection be made thereto by any three tax-payers of said village, the court may order a re-examination of said works and properties, and a re-appraisement thereof; and the court may make an order that testimony be taken concerning the value of said works and properties. Said re-examination and re-appraisement shall be made, and said testimony shall be

taken within twenty days from the time when said order shall be made, unless such time shall be extended by the court; and upon the presentation of said second report, the court shall proceed to consider the same, and shall thereupon confirm or reject the same. The compensation of such commissioners shall be three dollars per day for each day actually engaged, together with their actual and necessary expenses as adjusted by the court. The awards made to the corporation whose rights and properties are so taken, shall be paid by the water commissioners herein authorized to be created, from the proceeds of bonds, certificates or other obligations, which are hereby, authorized to be issued by such commissioners for such purpose, and thereupon all the rights, privileges, works, franchises and properties owned by said corporation, or held by it for its purposes, shall be vested in said village."

Sec. 23. Provides how reservoirs shall be constructed.

Sec. 24. The act not extended to any village where a board of water commissioners already exists.

Sec. 25. Provides procedure for extensions.

Sec. 26. Authorizes contracts with towns.

In the year 1896, by Chapter 310 of the Laws of that year, Section 165, above was amended to read as follows:

"Sec. 15. The entire annual receipts for water rents, after deducting therefrom such sums as may be necessary to defray the expenses of repairs of said water works and of extending the same, and other necessary expenses, shall be applied toward the payment of the interest on the loan hereinbefore authorized, and also toward the creation of a sinking fund for the payment of the principal of said loan, as it shall from time to time become due and payable, which sinking fund shall be managed by said commissioners. No investment shall be made in behalf of such sinking fund, except in the bonds of the United States, of the State of

New York, or of any city of this State, and in the bonds, certificates or other obligations authorized to be issued by such village under this act, which last named bonds, certificates and obligations the commissioners may purchase at any time when they shall have funds applicable, at prices not exceeding their par value, and when so purchased said bonds, certificates and obligations shall not be reissued, but shall be immediately canceled. The board of water commissioners of any village is, however, hereby authorized to invest, for the benefit of the said sinking fund, in policies of endowment insurance, in any life insurance company incorporated under the laws of this State, and having assets of over five million of dollars, as shown by the last preceding report of the superintendent of the insurance department, to an amount not exceeding the face value of the bonds, issued by said village for water works and for a term of years ending with the maturity of said bonds. The said commissioners may also, with the approval of the board of trustees in each case, loan said sinking fund on mortgage on improved lands in the same county, owned by the borrower; provided, however, that before they accept a mortgage on lands for any of said moneys they shall be satisfied that the borrower has a title in fee to such lands, and that the same are free and clear of all incumbrances and are worth three times the amount of the sum loaned exclusive of buildings: and they shall require the borrower to satisfy them, by proper evidence, that he possesses an estate in fee in such lands, free and clear of all incumbrances."

In 1890, by Chapter 527 of the Laws of that year, Section 16 was amended to read as follows:

"Sec. 16. In case of the estimated amount of the entire annual receipts for water rents, after deducting as in the preceding section provided, shall, in any official year ending with the next annual meeting of the village, not be sufficient to pay the interest for that year on said loans, or in case in any such year when any of the principal of the loan secured by said bonds falls due, the amount of said estimated receipts of water rents, after making said estimated deductions, together

with the sum in the said sinking fund shall not be sufficient to pay said principal, and also said interest, falling due that year, as estimated by the water commissioners, it shall be the duty of the board of trustees of said village, and they are hereby directed, on notice of such estimate from the commissioners, to cause such deficiency to be assessed, levied and collected from the taxable property of said village at the same time and in the same manner as other expenses of said village are assessed, levied and collected and the same shall be paid to the treasurer of the board of water commissioners to be applied to the payment of such interest or principal, or both. Whenever a deficiency shall be about to exist to pay such maturing interest or principal, or both, upon notice of the same by the board of water commissioners, it shall be the duty of the board of trustees, prior to the maturity of such obligations, to borrow on temporary loan on the credit of the village, at not exceeding the legal rate of interest, such sum as may be required to pay such deficiency, and pay the same to the treasurer of the board of water commissioners, and the same shall be applied to the payment of the interest or principal, or both, on said loans secured by said bonds. The amounts to become due on such temporary loans shall be assessed, levied and collected from the taxable property of said village at the same time and manner as other expenses of said village are assessed, levied and collected. Any surplus at any time in the hands of the board of water commissioners beyond the sinking fund required to pay such interest or principal, or both, and not required by them to pay other obligations of the board, or to extend, repair or carry on the water works or for a reserve for unforseen accidents, shall be paid to the treasurer of the village, for the use of the village, as the same may be appropriated by the board of trustees.

By Chapter 284 of the Laws of 1894, it was enacted as follows:

Sec. 1. Boards of water commissioners, acting under chapter one hundred and eighty-one of the laws of eighteen hunded and seventy-five, and acts amendatory there-

of, may establish a scale of rates for the use of water and also rates for fire protection, to be assessed on all real property abutting on the mains or within two hundred feet of the hydrants, or on such real property so abutting, or within such distance, as such boards may deem beneficial, upon which real property the water is not used by the owners or occupants thereof for domestic purposes. A day shall be appointed by the board for hearing grievances against such assessment, and said assessments shall be subject to review as other assessments. Upon completion of said assessment the board shall certify the same to its treasurer, who shall receive said rates for thirty days without fees. Upon the expiration of such time said board may issue its warrant to the village collector for the collection of arrears, and they shall be collected in the same manner as other taxes. The provisions of this act shall not apply to the counties of Kings, Queens, Richmond and Suffolk.

It clearly and unquestionably appears from an examination of these statutes and the date of their enactment that when, in 1887, the defendant village granted to the plaintiff herein, its franchise or charter and when it extended the same, and when the plaintiff actually constructed its system in 1889, under its said franchise, the said village (having at that time failed to provide itself and inhabitants) was possessed of two complete and adequate methods by which it might supply itself and inhabitants with water, namely, First, the method which, at that time it adopted, through the franchise granted to plaintiff, and Second, by constructing its own works, and rendering for itself the service which it had empowered and obligated the plaintiff to render.

The questions raised in this case were never before passed upon by the Court of Appeals of the State of New

York, while no case precisely similar has been up in any of the courts of said State.

The case of *Warsaw Water Works Co. vs. Village of Warsaw*, 161 N. Y., 176, argued and decided with this case was so like it that the decision and opinion in the former was held by the Court to be applicable to the latter case.

A third case, said to be similar in most of its features, was *Canandaigua Water Works Co. vs. The Village of Canandaigua*, 90 Hun, N. Y. R., 605, in which no opinion was written and in which no facts are stated,—but in which the decision was favorable to the village and against the company.

The judgment rendered in the case was not only unjust to the plaintiff, but is so conceded to have been.

In the State of New York there are possibly a hundred private corporations yet engaged in supplying municipalities with water, and valueing these at an average of $100,000 each, it would make a total investment in such plants of $10,000,000; and what is applicable in this respect to the State of New York is probably applicable to every State in the Union.

The laws of the State of New York conferring upon municipalities the power to acquire existing plants by condemnation under the power of *eminent domain*, (by paying for them their actual market value), such municipalities have conferred upon them a power, adequate

in all respects, to enable them to protect themselves from all injury, as from the exactions or the inadequacy of private corporate plants and a power which enables them to perform a public duty themselves, *without inflicting any injury whatever upon the private corporation.* And again, if the municipality does not care to engage in the business, it has protection in its recognized power to grant to a second company a like franchise to render the same public service.

The history of private corporations organized to supply villages with water is, that their organization takes place, usually, long before the inhabitants generally feel the necessity for such a supply. A few, half a dozen, of the more progressive, sooner awakened to the necessity of such a supply, urge upon the others their own views, but without success. They then say to the village authorities, "as the people don't wish to have the village, itself, render the desired service, give us a franchise to do it for and on behalf of the village." And the village voicing the sentiment of the majority, says yes, and confers the power.

But with burdensome restrictions nevertheless. It requires the company, (the law itself requires it), to specify definitely the source from which the supply is to be taken, (Chap. 737, Laws 1873), so that the village in the first instance chooses its own source of supply and can hardly be held to justify complaint if, subsequently, the source turns out to be not what it should be. The law also imposes the condition (Chap. 566, Laws 1890) that the company "*shall* supply" not only the village but the inhabitants thereof" with pure and

wholesome water at reasonable rates and cost." So the private corporation subjects itself also to such terms and conditions as the village authorities may impose by the terms of its franchise. In short it undertakes upon its part to fully and completely perform the whole duty of the village in respect to supplying itself and inhabitants with pure and wholesome water, in accordance with the terms and conditions prescribed by the village itself, so that the village plans, directs and controls even in such a case, its water supply.

The franchise containing the conditions, the restrictions and the limitations prescribed by law and inserted by the village authorities therein, being accepted by the private corporation, it is bound thereby; and, thereafter, constructing a plant adequate in all respects, it performs every obligation imposed upon it by the acceptance of the franchise and also performs the public duty which had otherwise been required of the village itself.

The sum which is invested originally in the plant, by no means represents the final investment. The people have to be educated to take and use the water after the private corporation has become ready to supply it. In the process of this education, the company loses money year after year. The first year it gets say fifty patrons, but these being insufficient to pay operating expenses, the company is obliged to raise more money, either upon a new issue of bonds or by advances by its stockholders. During the second year fifty more patrons are added, in the third, year fifty more—and after ten years, the

company has expended perhaps twice the original cost of the plant, which, with the original cost, constitutes the *investment*. It is then upon a paying basis.

Now at *this* time just when the plant begins to be profitable, the inhabitants of the village, especially those, who, at the outset were most hostile to the suggestion that the village should engage in the performance of its public duty and who, through hostility to the private corporation, have refused to become its patrons, begin to find fault with the private corporation, to criticise its service and favor the installation of a municipal plant.

"Conceded," they say, "that there is not room for two corporations to render the same service, if we establish a municipal plant there will soon be but one corporation rendering such service and that the municipal corporation,—In the first place our investment will not be much more than one-half that of the private corporation. Then we shall not have to educate the people, for the private corporation has already done that,—the market has been made for and awaits us. If the people refuse to take the water which shall be offered to them by the municipal plant and continue to take water of the private corporation they will soon cease doing so, because nobody will pay for the same thing twice over. That is, they will not pay to keep the private corporation alive by taking its water and at the same time pay taxes to keep the municipal plant in operation."

Putting the matter in a somewhat different light, we

have a village here, in the State of New York, owing to itself and its inhabitants "a public duty" which it is authorized to perform itself, or through the agency of a private corporation. In view of this situation it says, voicing a majority of its inhabitants, "if we render this duty ourselves, *at this time*, it will cost large sums beyond the first cost and therefore we won't do it. We will let some private corporation perform the duty for us, We will make it take the water from a good source; will make it agree to supply us with all the water we may require, at rates which we will state in the franchise, or at rates to be fixed hereafter under present or future laws; and then we will stand by and let it invest its money; let it get the people to pipe their houses, put in bath tubs and water closets—and then after a few years, when it has enough patrons to make the business profitable, we will just run alongside their mains, mains of our own, and say to these patrons, cut off from the mains of this private corporation and take from ours, or pay us the equivalent in taxes, whichever you please. It won't cost you anything to make the change, your house is all ready, that don't have to be interfered with, all that needs to be done is out here at the curb, and we will make the change for you without expense."

But when the time comes to say that, the patron of the private corporation protests and says it is not just to the private corporation. But the village replies "that don't make any difference. We have done precisely what the legislature has given us power to do, just what it intended we might do and should do in such a case. When we granted the private corporation its franchise,

knowing what our rights were, we did it to lead it on; to induce it to build a plant and educate the people, knowing all the time that as soon as the private corporation should have built up a business, the *law* would enable us to step in and take that *business* without paying a dollar for it. It is for that reason we don't propose to resort to the power of *eminent domain*. The greatest value which the private corporation has, is the *business* which it has built up on the franchise which we granted, and under the law if we build a plant of our own we can get that *business* for absolutely nothing."

"And although we chose the source from which the private corporation was to furnish a supply—and although we fixed the rates to be charged, and bound the corporation to supply us at such rates *for all time*, and although we reserved the right to condemn the plant to be constructed by the private corporation and its rights and privileges; although we have complete protection, and may even grant to another corporation the right to supply us—we will nevertheless convince the courts that what we have done or purpose to do, however questionable in justice and morality, is sanctioned and protected and upheld by law."

While the Court of Appeals of the State of New York unmistakably condemned the morality and "honesty" of this attitude, (record, Fol. 102,) it nevertheless argues that against it, the law is powerless; that the law, in fact, does sanction it.

While in the State of Pennsylvania, the Supreme Court of that State, condemned such attitude in equally strong terms, it was able to and did *vindicate the law* and made it not the upholder of injustice and immorality, but the means of overthrowing both; and it rejoiced when it discovered the principle which enabled it to do so, *although it was obliged to, and did, overrule itself.*

White vs. Meadville, 177 Pa. St., 643.
Metzger vs. Beaver Falls, 178 Pa. St., 1.
Howards Appeal, 162 Pa. St., 374.

From the Court of Appeals of New York which was clearly very much in doubt regarding the correctness of its conclusions, we come, with confidence, to this Court, with the important questions of our case.

POINTS.

1.

THE ACTION OF THE DEFENDANT CORPORATION UNDER THE DELEGATED AUTHORITY OF THE ACT OF 1875, WAS "A LAW OF THE STATE" IMPAIRING THE OBLIGATION OF A CONTRACT AND VIOLATIVE OF THE FEDERAL CONSTITUTION IN THAT RESPECT.

The numerous decisions of this and other courts, in

which the constitutional guaranty here invoked, has been under consideration, (not all of them in apparent harmony) and the importance of the present case, has suggested to counsel for the plaintiff, the separate consideration of propositions from "A" to "G" inclusive, as follows:

A.

THE DOCTRINE INVOKED, THAT IN FRANCHISES OF THE CHARACTER GRANTED IN THIS CASE, THERE EXIST, ABSOLUTELY, NO IMPLIED COVENANTS ON THE PART OF THE GRANTOR, IS NOT THE FACT; AND SUCH DOCTRINE IS NOT SUPPORTED BY AUTHORITY.

The celebrated *Charles River Bridge* case, (*Charles River Bridge vs. Warren Bridge*, 11 Peters, 420,) is referred to by our adversaries as supporting the doctrine that in the grant of a franchise to a private corporation to perform a public duty, the grantee takes *absolutely nothing* by implication, but the case does not warrant (and never did warrant), that contention.

The question before the Court was whether in the grant by the Legislature to the Charles River Bridge Company there existed without express words, the implied agreement that the Legislature would not

grant a like charter to another corporation to render the same service.

On this question the Court was divided, as the Supreme Court of Massachusetts had before been divided. The question was twice argued. Almost confessedly the decision was hostile to the current of authority. It was at variance with the law as laid down in Kent's Commentaries, Vol. III,458-9,—and was afterwards severely criticised. Judge Comstock in his notes to Kent's Comm. for example, calls the doctrine established "extraordinary" and "latitudinary", and says "it is to be greatly regretted."

It is manifest from a casual reading of the case, that the court had in mind the protection of public interests against the creation of monopolies. It was for the public interest and convenience that in the granting of franchises *there should be no restriction upon competition.* Here was a great highway for public travel, already enormous and rapidly increasing, and to say that the Charles River Bridge Company should constitute the only avenue for it would be to retard the general prosperity, and make the company an arrogant monopoly. In the argument much is said about "competition" and "monopolies." In the dissenting opinion of Judge Story, we find him stating the policy which there controlled the action of the majority of the court, and which led to the final result. At page 606, he says, "it is argued that the present grant is a grant of a monopoly and of ex-

clusive privileges; and *therefore* to be construed by the most narrow mode of interpretation," and so, he says, a Massachusetts statute aimed at monopolies "has been supposed to support the objection." And at page 608 he says, "But it has been argued and the argument has been pressed in every form which ingenuity could suggest, that if grants of this nature are to be construed liberally, as conferring any exclusive rights on the grantees, it will interpose an effectual barrier against all general improvements of the country."

So we have been cited to the cases of the *Syracuse Water Company vs. The City of Syracuse,* 116 N. Y. Rep., 157, *Matter of Brooklyn,* 143 N. Y., 596, (since affirmed in this Court), and *Turnpike Co. vs. State,* 3 Wall., 210, etc., as holding the doctrine that nothing whatever is taken in such grants, by implication.

But neither the Charles River Bridge case, nor any other case, is to be taken as holding such doctrine. It is an universal rule of interpretation applicable to the opinions of courts, that whatever is said in them, is not to be extended beyond its application to the particular case under consideration, and we think, if we turn to the opinion of the Chief Justice in the Charles River Bridge case, the prevailing opinion, we shall find that he did not contend that *nothing whatever* is taken by implication in such grants, but that his contention was (and that was placed upon the ground of public policy) that whatever

might be taken by implication, the implication of an *exclusive* grant did not obtain.

At page 549, he says, "The inquiry then, is, does the charter contain *such a contract* on the part of the State?" (A contract that it will not grant similar rights to others to render the like service.) "If a contract *on that subject* can be gathered from the charter, it must be by implication; and cannot be found in the words used. Can *such an agreement* be implied?

Mr. Justice McLean, who wrote for a dismissal of the bill (in the same case), says at page 557, "But it is con-"tended that in governmental grants, nothing is taken "by implication. The broad rule thus laid down cannot "be sustained by authority. If an office be granted by "name, all the immunities of that office are taken by im-"plication. *Whatever is essential to the enjoyment of "the thing granted, must be taken by implication.*"

In the *Sinking Fund cases*, 99 U. S., 700, Justice Bradley said in reference to the franchise then under consideration: "A reservation of power to violate a contract or alter it, or impair its obligation, would be repugnant to the contract itself and void. A proviso repugnant to the granting part of a deed, or the enacting part of a statute is void." All this is equivalent to the assertion that the grantor of a franchise agrees that it will do nothing repugnant to its grant.

There is no principle more clearly established by authority than the principle that a franchise is a contract; and that principle does not arise from express words contained in the franchise, *but it is the necessary implication.*

In the Dartmouth College case, the law was established that the grant of a franchise is irrevocable. That is to say, in such a grant is *the implied agreement* on the part of the State that the grantee shall forever enjoy the rights granted, unless there are words of limitation. Chief Justice Marshall in Fletcher vs. Peck, 6 Cranch, 87, 187, is to the like effect.

In *Syracuse Water Co. vs. Syracuse, supra,* the question was practically the same as in the *Charles River Bridge* case; and no more. But Mr. Justice Bradley in this case at page 182, says, "the plaintiff was given corporate existence and *vested with powers and privileges to enable it to exercise its functions.* This incorporeal hereditament was its *property* and whatever other or corporeal property it had acquired having relation to its legitimate *powers* and for the purpose of their *exercise,* became, and while applicable to such purpose was, *inseparably united with the franchise.* The corporate rights and *the corporeal means of their exercise* therefore constitute as it were a single body consisting of property corporeal and incorporeal. *Both the power and the means of exercising it* are essentially united, and upon such union is dependent *the enjoyment* as well as the *practical* value of the franchise.

In the case of *Fletcher vs. Peck*, 6 Cranch, 87-137, the Court said, *"A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right."*

And although this was said in relation to a grant of lands, it is equally applicable to the grant of a franchise, —to the franchise granted in this case.

Thus in *Greenwood vs. Union Freight Co.*, 105 U. S., 13, the Court in speaking of the Dartmouth College case said, "the opinion in that case carried the interpretation of the constitutional provision somewhat in advance of what had been decided in *Fletcher vs. Peck*, 6 Cranch, 87, and the preceding cases, *and held that it applied not only to contracts between individuals and to grants of property made by the State to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by statute, were, when accepted by the corporators contracts which the State could not impair."*

This language moves the annotator of the Am. and Eng. Ency. of Law, to observe (Vol. 15, p. 1035, Note 3). "The Court in this opinion evidently uses the term 'contract' in reference to *a charter* in the same sense that the Court in Fletcher vs. Peck, 6 Cranch, 137, used the same term in reference *to an executed*

contract, viz: 'A grant in its own nature amounts to an extinguishment of the right of the grantor and implies a contract not to reassert that right.' *This implied contract has its legal obligation;* this construction of an executed contract, *creates a continuing obligation to be protected and brings the obligation within the protection of the contract clause.*" (Of the Federal Constitution.)

So again the Court says in *Fletcher vs. Peck*, supra, "After the performance of a contract, that is after the contract is executed, there remains the implied contract *to which both parties have assented that neither shall retake and that each shall enjoy the right transferred in the execution of the contract.*"

In *People vs. O'Brien*, 111 N. Y., 1-51, the court says: "If it is possible to conceive the idea of a repealable grant, certainly such a grant accompanied with power to convey or pledge the interest granted, must, on the execution of the power *necessarily preclude* a resumption by the grantor of the subject of the grant or any right of property acquired under it."

It is assuredly well settled by authority that all corporations, *in the absence of express restrictions*, have the implied power to do all acts that may be necessary to enable them *to exercise the powers expressly conferred, and to accomplish the objects for which they were created.*

Pittsburgh, etc., R. Co. vs. Keokuk, etc., Bridge Co., 131 U. S., 385.

Fort Worth City Co. vs. Smith Bridge Co., 151 U. S., 294.

Jacksonville, etc., R. Co. vs. Hooper, 160 U. S., 514.

Am. & Eng. Ency. of Law, Vol. VII, p. 699 and citations.

Pearsall vs. Great Northern R'y. Co., 161 U. S., 646.

People ex rel vs. Deehan, etc., 153 N. Y. R., 528.

So contracts may be created without express words, i. e., by the *acts of the parties*, and these contracts are as much within the protection of the contract clause of the Federal Constitution as any other contracts.

Fisk vs. Jefferson Police Jury, 116 U. S., 131.

In *Piqua Branch of State Bank vs. Knoop*, 16 How. (U. S.), 369, the Court said: "Every valuable privilege given by the charter and *which conduced to an acceptance of it and an organization under it*, is a contract. * * The rate of discount, the duration of the charter, the specific tax agreed to be paid and *other provisions essentially connected with the franchise and necessary to the business", are secured by contract.*

So it was said upon the authority of numerous cases

cited in *City of Walla Walla vs. Walla Walla Water Company*, 172 U. S. 1, that franchises of the character now under consideration are *contracts*.

That is they are not simply licenses to the grantee to lay pipes in the streets, for a contract implies the existence of *mutual* covenants. Consideration answering to consideration. That one party does not obligate itself to render a great service, involving a great expenditure without some answering consideration, express or implied.

And so, in accordance with these contentions, the Court of Appeals in this very case affirms that *"the law* assured to the plaintiff at the time of its incorporation that its business should not be interferred with *otherwise than by competition,"* which is the equivalent of saying at least that in such franchises as this, there are implied covenants.

B.

WHEN THE DEFENDANT CORPORATION GRANTED TO THE PLAINTIFF CORPORATION HEREIN THE FRANCHISE IN QUESTION AND THE SAME WAS DULY ACCEPTED, CONTRACTUAL RELATIONS WERE THEREBY ESTABLISHED BETWEEN THE PLAINTIFF CORPORATION AND DEFENDANT CORPORATION, AS DISTINGUISHED FROM CONTRACTUAL RELATIONS BETWEEN THE PLAINTIFF CORPORATION AND THE STATE OF NEW YORK.

As we have seen that such franchises are *contracts*, they are necessarily contracts between the grantor and the grantee of them; that is to say, as such franchises are granted by the municipality, they are not contracts between the State and the grantee, but between the municipality and the grantee.

We therefore have no case here of *a franchise granted by the legislature of the State.*

No case of a franchise granted by the legislature to one corporation, to render a public service and a like franchise to another corporation to render the same service.

While the Legislature delegates to the municipality in such cases, the performance of its own power, the act performed by the municipality in its grant of a franchise, is, *its own act.* In other words *it makes its own contract.*

This is the necessary and logical conclusion which follows from the existence of the statute which authorizes the *village itself, if agreeable to itself,* to make a "contract *for itself.*"

While it is quite true that *the power* conferred upon the defendant corporation to grant franchises of the kind granted in this case, is a delegated power, such delegated power carries with it, nevertheless, whenever it is exercised, the assumption of obligations and, particularly, the assumption *of contractual relations* with every private corporation on whom it confers the privileges of its franchise. Thus, while in 1887 the corporation defendant was authorized to make the grant which it then made to the plaintiff, the fact that it was *authorized* to make it, made it no less, *its own act.*

And when a municipality makes a contract, or enters into contractual relations with another, it may make itself liable upon implied contracts, or covenants, just as individuals and privite corporations may, if within the scope of their powers, to be deduced by inference from authorized corporate acts, without either vote, deed or writing.

Dillon on Mun. Corp. (4th Ed., §459.)
Am. & Eng. Ency. of Law (1st Ed., Vol. 15, p. 1081.)

So in *Mayor, etc., vs. Second Avenue R. Co.* (32 N. Y., 261, 272), the court says: "Assuming that the Common Council had power to make the grant, then its

acceptance by Pearsall and his associates * * invested the latter with the right of property in the franchise which the Common Council could not take away or impair by any subsequent act *of its own.*"

The power of the corporation in the premises is limited, without doubt, to the power conferred; and also to the limitations imposed upon the legislature of the State by the constitution of the State. We therefore concede that as the legislature may not grant any "exclusive privilege," the municipality in this case could not and did not grant to the plaintiff any exclusive privilege whatever. *Let it be understood that this point is conceded at the very start*, so that the grantor, the defendant village, notwithstanding its grant to this plaintiff, possessed the authority, without any sort of question, to grant to any individual, company or other private corporation the same authority, franchise and privilege which it had granted to this plaintiff.

Had it, (the grantor) conferred upon an individual, company or other private corporation the same authority, franchise and privilege which it had granted to the plaintiff, the plaintiff and such individual, company or other corporation, would have been *the competitor* or rival of the plaintiff.

Had the defendant corporation, therefore, granted to such individual, company, or other corporation, the same authority, franchise and privilege which it granted to the

plaintiff, the language of the Court in *Turnpike Co. vs. State*, 3 Wall., 210, 213, would have been applicable to the plaintiff, had it then complained of such action on the part of the defendant. In the case cited above, it appears that *the State* of Maryland incorporated a company with power to construct a turnpike between Baltimore and Washington; and subsequently incorporated a railroad company with authority to construct a railroad between the same cities, the line of which ran near to and parallel with the turnpike. One of the questions in the case was whether the last act impaired the obligation of the contract with the turnpike company, it appearing that the construction of the railroad had rendered it impracticable for the company out of its diminished income to maintain the turnpike in proper order. This Court said, "The difficulty of the argument on behalf of the Turnpike Company, and which lies at the foundation of the defense, is that there is no contract in the charter of the Turnpike Company that prohibited the legislature from authorizing the construction of *the rival* railroad. No exclusive privileges had been conferred upon it, either in express terms or by necessary implication; and hence, whatever may have been the general injurious effects and consequences to the company from the construction and operation of *the rival* road, *they are simply misfortunes which may excite our sympathies, but are not the subject of legal redress.*"

To the rule thus laid down, therefore, we are, and

have been, throughout this case, in entire accord. The contractual relations which existed between the plaintiff and defendant did not embrace such an agreement on the part of the defendant corporation. We never claimed that it did. Our denial of such claim was not sufficient to convince the Appellate Division of the Supreme Court of the State of New York; (see memorandum of decision, record p.98) and in the Court of Appeals of the State of New York, we had some difficulty though we finally succeeded in making it clear that we did not make *that* claim. (Fol. 221 of record).

And if we concede that the fee of the streets in the villages of the State of New York is vested in such villages and that such fee is held in trust for the public uses of all the people of the State so that the legislature, *against the consent of the village*, may authorize the use of such streets for public purposes, it does not affect in any manner the contractual relations, which are created when the village in the exercise of *its* authority confers by *its* act, a franchise upon a private corporation to use the public streets.

C.

THE CONTRACTUAL RELATIONS WHICH EXISTED BETWEEN THE DEFENDANT (GRANTOR) AND THE PLAINTIFF (GRANTEE), EMBRACED MUTUAL OBLIGATIONS AND COVENANTS, NOTWITHSTANDING THERE EXISTED NO AGREEMENT ON THE PART OF THE GRANTOR THAT THE GRANTEE SHOULD POSSESS AN EXCLUSIVE PRIVILEGE.

In Point 1, we have pointed out certain of the implied contracts which arise out of grants of the character under consideration; and while we have shown that it is the settled policy of the government that in such grants there shall not arise the implication of an exclusive grant or that while the grantor reserves in such grants the right to authorize competition, there is always the implied covenant that *the grantor* itself will not otherwise, do any act repugnant to its grant. We therefore contend that when the defendant granted to the plaintiff its franchise in this case, *it* agreed that *it* would do nothing repugnant to its grant, excepting always that it did not agree that it would not grant to some individual company or other private corporation a similar franchise to render to it the like service.

Second. It agreed that the grantee should have and possess the means as well as the power of exercising the rights granted to it without obstruction or hindrance, and especially without *prevention*, on the part of the

grantor. It herefore agreed that it would not take itself out of the field as a possible consumer or taker—although it did not agree that it would not take of a rival of its said grantee, to-wit: of some other like grantee. In other words the grantor agreed that the grantee should be clothed with every right essential to the enjoyment of its grant.

Third. So we say the grantor agreed that it would not "take back" the thing which *it* granted, excepting by the exercise of the power of *eminent domain.*" That the power granted to it and reserved to it, to acquire the very property and rights granted, by the exercise of the power of *eminent domain*, raised the implied agreement, in and of itself, that it would not take back the rights granted, excepting by the exercise of such power.

Fourth. As, at the time of the grant to the plaintiff, the defendant was possessed of two complete and adequate means, by which it was enabled to perform a public duty, (1.) by the method which it adopted, that is, through the instrumentality of the private corporation, (2) by the construction and operation of a system of its own, its grant to the plaintiff waived and "extinguished its own right," and contained the agreement that it would not reassert such right.

Fifth. It agreed that *its* grantee should not be interferred with otherwise than by a competitor.

Sixth. And finally, it agreed that it would not *itself, by affirmative act upon its own part,* destroy the franchise or rights which it granted or the property which should be accumulated under and by virtue of its grant, although we concede, that it did not agree that the value of the property and rights conferred should not be injured or impaired by *competition.*

We contend, among other things, it will be seen, that when the government itself (i. e., a political sub-division of the State) possessing the power of choosing whether it will, itself, engage in the performance of a public duty, or contract with a private corporation, and it makes choice of the private corporation, that it agrees with such private corporation, to waive its own right. This contention is very nearly warranted by the language of the Court in *City of Walla Walla vs. Walla Walla Water Co.*, supra, as follows: "The question "whether the city should supply itself with water, or "contract with a private corporation to do so, presented "itself when the introduction of water was first pro- "posed *and the city made its choice not to establish* "*works of its own.*"

In the Pennsylvania cases (*White vs. Meadville*, 177 Pa. State, and other cases) the Court holds that where the borough is possessed of the two methods of supplying itself with water there is *no* repugnancy, because the legislature did not mean that both methods might be in operation at one time, but that where either

method had been adopted the power of the borough should be treated as exhausted. So it says "there will be a *decided* repugnancy in their operation if both methods be put at work at the same time."

But here, in this very case, the Court of Appeals of the State of New York has held (and that holding is conclusive upon this Court) that "the defendant has done precisely what the statute authorizes it to do." The "decided repugnancy" avoided in the Pennsylvania statutes, therefore, is permitted to exist in the statute of the State of New York. But its very existence is evidence, at least, that what the defendant has done was repugnant to its grant and, therefore, violative of its contract.

D.

THE DEFENDANT MUNICIPALITY, AS THE OWNER AND OPERATOR OF A SYSTEM OF WATER WORKS, IS NOT, IN ANY SENSE, THE COMPETITOR, OR RIVAL, OF THE PLAINTIFF.

That is to say—instead of becoming a competitor, or rival,, when it constructed and operated its system, it *superseded* the plaintiff and rendered the service itself, which it had before agreed that the plaintiff should not only render *for* it but *to* it, *for it must not be forgotten*

that the franchise granted in this case was a franchise to supply the village and its inhabitants with pure and wholesome water.

It no longer required the services of the plaintiff, *nor of any competitor of the plaintiff*. It no longer needed that any one should supply it, it was no longer a bidder in the market for the commodity in question. The *power* of the plaintiff to exercise the right conferred no longer existed, because the defendant as a consumer, as a customer, as a bidder in the market, no longer existed. The village, in other words, by its own act, placed itself beyond the reach of the plaintiff, by placing itself beyond the necessity of being supplied.

And this we insist was an act which actually *prevented* the plaintiff from exercising the rights granted to it. It no longer possessed the *means* or *power* of exercising such rights. The principal right *essential to the enjoyment of the grant*, the right of supplying the village, at least as a competitor, was taken away by the act of the village exercised in pursuance of a statute of the State of New York.

And so as to the inhabitants of the village.

The Court of Appeals of New York held and decided that an act passed by the Legislature of such State in 1894 was unconstitutional and void as impairing the obligation of the contract existing between the

parties because, under it, those of the inhabitants disposed to patronize the plaintiff, might be induced by a money consideration to become the patrons of the defendant. (Record, folios 226-227).

But the same inducement necessarily grows out of the very relation which exists between the inhabitants and the village. The very nature of the transaction, is such that every inhabitant of the village becomes, in effect, a stockholder in the enterprise inaugurated by the village. Every such inhabitant becomes personally interested in the success of the enterprise. If the revenue is insufficient to meet the operating expenses the deficiency must be made up in some way; and in this case the statute provides for its assessment upon the inhabitants. The inhabitants are, therefore, precisely like stockholders in that they are liable to be assessed to make good an impairment of the capital. So, on the other hand, if the revenue exceeds the expenditure, every inhabitant shares in it, because it results in a reduction of taxation for other purposes, or if not that, in a reduction of the sum which he has to pay for the water which his necessities require.

In *City of Walla Walla vs. Walla Walla Water Company, supra*, it was pointed out in the opinion of the Court that "if the city were allowed to erect and maintain competing water works, the value of those of the plaintiff company would be materially impaired if not practically destroyed." And the Court further says:

The city might fix such prices as it chose for its water, and might even furnish it free of charge to its citizens and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit and the citizens would naturally take their water where they could procure it cheapest. The plaintiff upon the other hand must carry on its business at a profit or the investment become a total loss."

(It is to be noted, in passing, that the statute authorizes water commissioners in this case to fix the water rates and provides that taxes shall be levied for deficiencies).

It is insisted, therefore, that when a village enters upon the business of supplying itself and its inhabitants, as in this case, it cannot with truth be said that it is in any sense whatever the *competitor* of the existing private company. On the contrary it has "taken back" the very rights which it granted to the private company. It has "taken back" the very *franchise* which it granted, —and there remains nothing whatever for the private company to do. It has been deprived of its market and hence, of its business.

The village, in such a case, *reasserts* its own right to do the very thing which by grant of power it said the private corporation should do for it,—and leaves the private corporation wholly without *power*. Such is the necessary and inevitable result which follows from the subsequent act of the village.

It is seen from the above quotation from the *Walla-Walla* case, however, that the Court uses the expression "if the city were allowed to erect or maintain *competing* water works." It is from the idea that in such a case the city becomes only a competitor, that such cases as *Charles River Bridge vs. Warren Bridge and Turnpike Co. vs. State* and other kindred cases are cited against us. But they have no application whatever. It is insisted that no such thing as competition was or can exist in a case of this kind. The suggestion that, it can, or does, is against the fact and against reason and common sense. Competitors necessarily stand on equal terms. The Constitution guarantees them the "equal protection of the laws." But here the municipal corporation is the *government* and taxes the private corporation to build as well as maintain its own works, and as the Court concedes in the *Walla Walla* case, possesses power to *compel* its inhabitants to take their supplies from its own mains. That is, if the private corporation is a competitor it possesses the *power* to destroy its competitor. So the referee finds in this case, *as a fact*, that "when the plaintiff shall cease to furnish water to the defendant *its income will be insufficient to meet its outgoing expenses*," and, of course, that means destruction; and it arises because the plaintiff is not *in the nature of things* permitted to compete with the village for the water which the village and its inhabitants require.

By what process of reasoning, the municipal corpora-

tion, under such circumstances can be held to be the competitor of the private corporation it is difficult to understand; and yet, so far as we have been able to discover, no case of like character to the one under consideration has ever been decided in this court, or in any other court, in favor of the municipal corporation, unless it has been *assumed* that the municipal corporation was the mere competitor of the private corporation; and, therefore, on the authority of such cases as *Charles River Bridge vs. Warren Bridge* and *Turnpike Company vs. State.*

If the defendant had granted to another corporation precisely what it had granted to this plaintiff, the two corporations would have been competitors. Competitors for what?

First. Competitors on equal terms for the patronage of the requirements of the defendant itself, and *second* competitors on *equal terms* for the requirements of the inhabitants of the defendant. Neither could tax the other, neither could by the exercise of superior *power*, secure the patrons of the other.

What is said in *City of Walla Walla vs. Walla Walla Water Co.* (supra), in view of the twenty-five years' contract in that case, is as applicable to to the case under consideration as it was to that case; and we think that the proposition here contended for should, without further discussion, be conceded. The village does not do what it has done in this case as a competitor, but as

a successor of its grantee, as a reasserter of its own right, and, therefore, as a violator of its own contract.

In *Lehigh Water Company vs. Easton*, 102 Pa. St., 515 (affirmed in this Court, 121 U. S., 388), the Supreme Court of Pennsylvania, said with much confidence that the third claim made by the plaintiff "*is wholly without merit*; by constructing a water company of its own, the borough will *not* destroy the franchises of the company; it may impair their value, and probably will do so; but of this the company have no legal cause of complaint."

That this was error on the part of that court is proved by what the same court was finally compelled to say, and did say, in White vs. Meadville, 177 Pa. St., 643. Side by side with the conclusion reached in *Lehigh Water Company vs. Easton*, supra (which resulted in an affirmance by this court) we place the conclusion of the same court on the same subject, in *White vs. Meadville*, supra, as follows:

"If anything be manifest, it is that if two water mains be laid side by side on the same street equally accessible to the house-holder on each side conveying double the quantity needed, with double sets of hydrants, pumping stations, offices, salaries and expenses one or the other must be abandoned. No community will pay double for any article of necessity or luxury. If the property holder must by compulsory taxation support the municipal system he will not voluntarily support the private system. *Such a conflict of interests will inevitably bankrupt the system which depends*

on the voluntary patronage of the public. "We hesitate to assume, every court is bound to hesitate long before assuming that the legislature intends by grants to distinct corporations for public purposes there shall arise such conflicts in the exercise of the franchises as will result in the practical destruction of property of any citizen without compensation. It is a cardinal rule of construction between older and younger grants of franchises that the sovereign does not intend the younger shall infringe upon the elder. But to assume that these franchises can be in existence and operation at the same time, is to assume that the commonwealth has granted precisely the same thing to the municipality that it had already granted to the water company, *for in a business view the contemporaneous exercise of the franchise is impossible.* * * * There was no grant of power to put both methods in operation at the same time. For once the power had been exercised, to supply the city by contract through another creature of the same sovereign, then the municipal function has passed from the city and must be performed by the other contracting party which last has rights and obligations imposed upon it by law as clearly defined and capable of enforcement as those of the city."

It took the Supreme Court of Pennsylvania nearly twenty years to discover its own error, but when it did discover it, it was not reluctant to admit it. The conclusion reached, in this respect, by the Supreme Court of Pennsylvania will ultimately be reached by this Court, if it has not already reached it. It is a question which, as the inclination grows stronger toward governmental control of business enterprises, will become more important and more insistant.

The decisions which have obtained, if any, upon the

theory that in such cases the municipality becomes only the rival or competitor of the private company, and which have, therefore made the *Charles River Bridge* case and the *Baltimore and Washington Turnpike Company* case, applicable, need to be reconsidered.

The franchise granted in this case having been a franchise to supply *the village and its inhabitants* with water the act of the village in constructing its own system *to supply itself* and its inhabitants was in *effect* a *revocation* of its franchise.

The position of the defendant corporation in relation to the plaintiff is somewhat analogous to the position which the national government would have occupied in relation to the Union Pacific Railroad had it constructed a parallel road of its own, in order to supply itself with the transportation facilities which the Union Pacific Railroad Company had been constructed to supply to it. The anology would be more complete if all the people of all the states had been made sharers in the profit and loss of the government road, and, therefore, with the government, its patrons. Had such an act taken place the Union Pacific Company would have had much more to complain of than the law which created a sinking fund to secure the payment of its obligations to the government, and which was upheld, in this Court, by a somewhat narrow margin.

E.

THE ACTS OF 1873 AND 1875 WERE, BOTH, ACTS WHICH CONFERRED UPON THE VILLAGES OF THE STATE OF NEW YORK LEGISLATIVE POWERS; THE FIRST TO GRANT RIGHTS AND PRIVILEGES (OF ITS OWN) TO PRIVATE CORPORATIONS AND THE SECOND TO ADOPT RESOLUTIONS AND ORDINANCES TO PUT IN FORCE THE PROVISIONS OF A STATUTE OTHERWISE INEFFECTUAL.

It has been urged against the plaintiff, that when, in 1887, it procured from the defendant the right to supply it and its inhabitants with water, the act of 1875 was in existence and, therefore, it is argued the passage of such act could not have impaired the obligations of any contract made between the plaintiff and defendant in 1887.

But we deny that the statute of 1875 was a law of the State of New York, when in 1887 the plaintiff obtained its franchise or when in 1889 it carried out its contract and constructed its system of water works.

It did not become a law of the State as to the parties here until the defendant had by the adoption of resolutions and ordinances accepted it and legislated in pursuance of it.

The first section of the act provides that "the authorities of any incorporated village in this State *may here-*

after organize into a board of water commissioners in the manner by this act provided." Subsequent sections define the acts which may be done when such authorities have so organized and the people by a vote have given them authority to act. Thus,

By Section 21, it is provided as follows: "*At any time after the passage of this act* a meeting of the electors of any village may be called by its board of trustees upon notice published for two weeks in one or more weekly newspapers published in said village, or if no newspaper is publised in such village then in the nearest newspaper published in the County in which such village may be situated, and at which the question will be submitted, whether the taxes in this act authorized for the purposes aforesaid" (constructing a system of water works) "shall be levied and collected from the village as in this act provided: *and no commissioner shall proceed with any duties under this act unless* the majority of voters and of the taxpayers whose names appear upon the last assessment roll of the village voting at such meeting shall vote in favor of such taxes. Said votes shall be by ballot and there shall be written or printed on the ballots of those in favor of taxes, "for the water taxes," and on the ballots of those opposed "against the water taxes," the said board of trustees or any of them shall preside and certify the result of said meeting and the village clerk shall, within five days thereafter, serve each of the commissioners with a certified copy of such certificate."

Here was simply an act of the legislature conferring power upon a village to determine for itself whether it should at some future time construct a system of water works. Its authorities are permitted to decide whether they shall organize as a board of water commissioners; and having so decided and organized, they may proceed to construct a system of water works, if the electors and voters shall vote the necessary taxes. No law existed, however, until the authorities of the village and the electors had voted. It was an act not for the whole State but for particular sub-divisions and such particular sub-divisions were given the right to legislate for themselves upon the subject and to say whether as to them the act of 1875 should be a law or not, and until they should have spoken favorably it was not, a "law of the State" at all. On the other hand, when the authorities and the electors should have voted favorably it became a "law of the State."

In *New Orleans Water Works Co. vs. Louisiana Sugar Co.*, 125 U. S., 18-31, the Court says:

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power, delegated by the legislature to the corporation, as a political subdivision of the State, having all the force of law within the limits of the municipality that it may be properly considered as a law within the meaning of the article" (contract clause) "of the Constitution of the United States. For instance, the power of determining what persons and property shall be taxed, belongs exclusively to the legislative branch of the government and whether exercised by the legislature itself or delegated by it to a

municipal corporation *is strictly a legislative power.* U. S. vs. New Orleans, 98 U. S., 381-392; Merriweather vs. Garrett, 102 U. S., 472."

In *Murray vs. Charleston*, 96 U. S., 432, 440, it appears that the City of Charleston had issued certificates of indebtedness. *By its charter granted in 1783*, power was conferred upon its council to make such assessments on the inhabitants or those holding taxable property within the city, as should, to the council, appear to be expedient, &c. Under this authority repeated in subsequent legislation, ordinances were passed by the council *in 1870 and 1871* assessing such certificates. The Court says:

"It was not until the ordinances were passed under the supposed authority of the legislative act, that the provisions became *the law of the State*. It was only when the ordinances assessed a tax upon the city debt and required a part of it to be withheld from the creditors that it *became the law of the State* that such withholding could be made. The validity of the authority given by the State, as well as the validity of the ordinances themselves, was necessarily before the Court of Common Pleas when the case was tried; and no judgment could have been given for the defendants without determining that the ordinances were laws of the State not impairing the obligation of the contract made by the city with the plaintiff."

In *Williams vs. Bruffy*, 96 U. S., 176, it was held that any enactment *from whatever source originating, is a statute of the State*, within the meaning of the act regulating the appellate jurisdiction of this court over judgments and decrees of State courts."

So in *Hamilton Gas Light Co. vs. Hamilton City,* 146 U. S., 258-266: "A municipal ordinance passed under supposed legislative authority, must be regarded as a law of the State within the meaning of the constitutional prohibition against State laws impairing the obligations of contracts."

In *Mayor, etc., vs. Second Avenue R. Company,* (32 N. Y., 261-271,) the Court says:

"The rights of municipal corporations to property in lands and its usual incidents, and to create and establish ferries and railroad franchises, are quite distinct and separate from their duties as legislatures, having authority to pass ordinances for the control and government of persons and interests within the city limits. The latter are powers *held in trust,* as all legislative powers are, to be used and exercised for the benefit and welfare of the whole community, while the former are property, in the ordinary sense, to be acquired and conveyed in the same manner as natural persons acquire and transfer property, and subject to the operation of such by-laws and ordinances as may be *lawfully passed* for the government and control of the city."

And again in the same case at page 272:

"Assuming that the Common Council had power to make the grant then its acceptance by Pearsall and his associates * * * invested the latter with the right of property in the franchise, *which the Common Council could not take away or impair, by any subsequent act of its own.*"

This case is approved in *People vs. O'Brien,* 111 N. Y., 1.

We, therefore, contend that the act of 1875 did not create or organize a board of water commissioners in the village of Skaneateles and that it did not pretend to do so: that it did not confer any power upon a board of water commissioners to construct a system of water works in such village. What it did do was that it delegated power to the authorities of such village to legislate on that subject and in pursuance of such authority the authorities of such village in the year 1896 organized themselves into a Board of Water Commissioners. Nevertheless, this Board, though organized, was wholly without any power, until the electors and voters of the village had voted to impose a tax of $30,000 upon the people, which we have seen *supra* was a legislative act.

The statute of 1875 became a law of the State, within the meaning of the contract clause of the Federal Constitution in 1896 and not in 1875, and it was not such a law when the defendant made its contract with the plaintiff in 1887 or 1889.

Doubtless the plaintiff knew that the State had delegated this power of legislation upon the village when it constructed its system of water works, but it knew also that at that time the village had not acted upon its delegated power, that it had passed no ordinance or resolution, had organized no board of water commissioners, had voted no tax,—and it had the right to say that any

act of the village under the statute of 1875, would be legislation *subsequent to its contract* with the plaintiff, and an act impairing its obligation.

While it is thus clear that "the law of the state," impairing the obligation of the contract in this case, was *subsequent* to the contract, we are not content with the authorities which hold that it must be a law subsequent to the making of the contract, which impares the obligation of a contract.

In *People vs. O'Brien*, 111 N. Y. 1, the Court says: "An express *reservation* by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly would be equally ineffectual and void."

So in the *Sinking Fund cases*, 99 U. S., 700, Mr. Justice Bradley says: "The reserved power in question is simply that of legislation to alter, amend or repeal a charter. This is very different from the power to violate or to alter the terms of a *contract* at will. A *reservation* of power to violate a contract, or alter it, or impair its obligation would be repugnant to the contract itself and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute is void. Interpreted as a reservation of the right to legislate the reserved power is sustainable on sound principles *but in-*

terpreted as the reservation of the right to violate an executed contract it is not sustainable."

F.

THE ACT OF THE DEFENDANT IN CONSTRUCTING AND OPERATING ITS OWN SYSTEM OF WATER WORKS, UNDER THE CIRCUMSTANCES OF THIS CASE, FINDS NO SUPPORT OR JUSTIFICATION, LEGAL OR OTHERWISE, IN THE RESERVED POWER OF THE LEGISLATURE OF NEW YORK TO "ALTER FROM TIME TO TIME OR REPEAL," GENERAL LAWS PROVIDING FOR THE FORMATION OF CORPORATIONS.

The constitutions of the states relating to corporations differ materially. Thus, while it is, or was, provided in the constitution of Ohio (1851) that, "no special privilege or immunities shall ever be granted that may not be altered, revoked or repealed by the general assembly", *no such reservation exists in the constitution of New York.*

It is provided in the constitution of New York, only, so far as this case is affected that, corporations may be formed under general laws "and that" all *general laws* may be altered from time to time or repealed."

It is apparent that the reservation of power to alter, repeal or revoke *any* special privilege granted (Ohio constitution) is not the same thing as power reserved

to alter or repeal a general law providing for the formation of corporations. The power to revoke *any* special privilege, refers to every separate, single individual privilege. That is to say *any* one, special privilege, may be singled out from a general class and revoked,—while the power to alter or repeal a *general* law, is a power which, when exercised, will affect every corporation organized under it, alike.

So, while under the constitution of Ohio, delegated power to grant special privileges may be conferred upon municipalities under a general statute, under the same constitution power may be delegated (implied from the delegated power to *grant* the special privilege) to revoke its grant. If that be the case under the constitution of Ohio, however, no such power of revocation could be conferred upon a municipality of the State of New York, because it is a power which the legislature of New York, itself, does not possess.

If it be conceded that the repeal of a *general* law under which a franchise has been granted is, in effect, the same thing as the revocation of a franchise (which however, we do not concede) the power to revoke *any* special privilege, and the power to repeal a general law, are two very different things to be taken account of when it is proposed to organize a corporation.

What a modicum of danger exists in the power to repeal a *general* law under which hundreds of corporations have been organized and under which millions of

dollars of capital is being profitably employed. On the other hand how great the danger in the reservation of power to revoke *any* special privilege.

If the plaintiff accepted its franchise subject to the right of the legislature to amend or repeal the general law which authorized it, it was accepted subject to such alteration or repeal *only*, and we are not complaining because the legislature has altered or repealed such law. The law, in fact, though it may have been amended, has not been repealed, and, therefore, if repeal is equivalent to revocation, there has been no revocation.

Until the general law of 1873 has been repealed (by the legislature) we will not be called upon to ascertain the rights of this and a hundred like corporations formed under its provisions.

In Miller vs. N. Y. & E. R. Co., 21 Barb. (N. Y.), 513, which has been cited with approval in this Court, it was contended that the power to repeal, conferred unlimited power to amend, but Mr. Justice Strong in relation thereto aptly said "It is not material to inquire "whether the legislature has a right to repeal the de- "fendant's charter unless it has been forfeited by the "misconduct or neglect of its managers. *It has not "been repealed and until it shall be the company is, and "will be protected by the constitution in its rights of "property.*"

But when it comes to repealing a *general* law as a means of revoking the franchises of corporations organized under it, assuming the existence of such a power, it would be in practice a nullity. A power, the exercise of which, has never been attempted in New York, and never will be, until the rights of property are wholly repudiated.

Further than this, however, where the power to repeal (or revoke, if to repeal is to revoke) exists, it is a power which has its limitations. It cannot be resorted to, to enable the grantor to repudiate its contract. It cannot be resorted to, to enable the grantor to take back for its *own uses and purposes* the rights and privileges which it granted. It cannot be resorted to, where its operation will destroy directly, or indirectly, property and rights lawfully acquired.

As regards even this reserved power of the legislature to alter or amend the power is a limited one. In *Shields vs. Ohio*, 95 U. S., 319, Mr. Justice Swayne writing the opinion of the Court, says (p. 324): "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers the vested rights of property of corporations, in such cases are surrounded by the same enactions and are as inviolable in other cases."

Again in Miller vs. State, 15 Wall., 478, 498, the Court says: "This reserved power to legislate is not without limit and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter and which, by a legitimate use of the powers granted have become vested in the corporation."

In the *Safety Fund cases*, 99 U. S., 700, Chief Justice Waite says: "Congress not only retains but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of the legislative power. *That this power has a limit no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits, actually reduced to possession, of contracts lawfully made.*"

But in New York, whatever may be the law in Ohio or Massachusetts, there exists no reserved power to *revoke* a franchise conferred upon a private corporation. The power to alter and repeal general laws providing for the oganization of corporations, may, and quite likely does, constitute a reservation of power to destroy or take the life of the corporation itself, but that is not a reservation of power to revoke a franchise. The franchise is property which survives the corporation. That is, the death of a private corporation has no other effect

upon its property than the death of a natural person upon his (*Mumma vs. Potomac Co.*, 8 Pet., 281, 285.)

The nature and character of such franchises is an important inquiry in the consideration of this case. In the "Canandaigua case" so called, which, no doubt, will be called to the attention of this Court (we have been unable to lay our hands upon the report of the case), Judge Coxe is alleged to have said, in speaking of a like franchise: "It was a license and nothing more." If it was no more than that, it was probably revocable, but it was more than that, it was a franchise, it was a contract.

In *People vs. O'Brien, et al.* (111 N. Y. Rep., 40-41) the Court (in an opinion, which for point, ability, breadth and clearness, deserves to rank with the greatest of judicial utterances) said, "When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country; the numerous laws adopted in the several states providing for their security and enjoyment and the extent of litigation conducted in the various courts, State and Federal, in which they have been upheld and enforced, there is no question, but that in view of legislatures, courts and the public at large certain corporate franchises have been uniformly regarded as *indistructable by legislative authority* and as constituting property in the highest sense of the term. It is, however, earnestly contended by the State, *that such a franchise is a mere license or privilege enjoyable during the life of the grantee only and revocable at the will of the State.* We believe this proposition to be *not only repugnant to justice and reason, but contrary to the uniform course of authority in this country.* The

laws of this State have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the right of eminent domain, and invested them with the attributes of property generally."

The franchise under consideration is included in the franchises above referred to for the court in the same case says, page 47, "we must be understood as referring only to such franchises as are usually authorized to be transferred by statute, viz, those requiring for their enjoyment the use of corporal property, such as railroad, canal, telegraph, gas, *water*, bridge and similar companies."

The case cited above (*People vs. O'Brien*, 111 N. Y., 1), was that of a street railroad corporation, which had obtained from the municipality of the city of New York the franchise or privilege of operating a railroad on one of the streets of that city. The corporation was subsequently dissolved by an act of the legislature. The legislature created various statutes under which a certain action was brought and the Court says (page 36), "the statutes upon which the action is predicated confessedly assumes the right and power of the legislature to wrest from the company its franchises; to transfer them to other persons and bestow their value upon the donee of the State. *The statutes contemplate the absolute destruction of the property of the corporation and the loss of its value to the creditors* who have made loans in good faith upon the security of such property, and this action is avowedly prosecuted *to accomplish the purposes of the legislation*. It is therefore contended by the Attorney-General that none of the franchises of the corporation survived its dissolution and that the mortgages pre-

viously given thereon as well as all contracts made with connecting street railroads for the mutual use of their respective roads, fell with the repeal and could not be enforced."

"If it could be supposed for a moment, that this claim was reasonably supported by authority or maintainable in logic or reason, it would give grave cause for alarm to all holders of corporate securities."

"The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the Constitution gives to property, and are subject to the arbitrary will of successive legislatures, to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice as well as the traditions of the Anglo-Saxon race in respect to the security of the rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary and we desire in unqualified terms to express our disapprobation of such a doctrine. Whatever might have been the intention of the legislature or even the framers of our constitution in respect to the effect of the power of repeal, reserved in acts of a corporation, upon property rights of corporations, such power must still be exercised *in subjection to the provisions of the Federal Constitution.*"

We quote at length from this opinion because the attempt made in that case, as stated in the quotation, corresponds with the defense made in the case under consideration. The defendant asserts its right "to wrest from the plaintiff its franchise" under legislative sanction: to take it, itself, "as the donee of the State." The statute under which it proceeds "contemplates the absolute destruction of the property of the corporation, and

the loss of its value to the creditors, who have made loans in good faith upon the security of such property," and the defense seeks to accomplish the purposes authorized by the legislature. It is therefore contended by counsel for the defense that the thing granted being a mere license, revocable at the pleasure of the grantor and that the construction of a plant of its own, being no more than a revocation, neither the plaintiff nor its creditors have cause of complaint.

But it seems that under the Constitution and laws of New York the franchise granted to the plaintiff is irrevocable. The Court of Appeals of the State of New York so holds not only in *People vs. O'Brien, (supra)*, but in numerous other cases. The argument against the contention that such franchises are irrevocable, either directly, or by the repeal of the act of incorporation, proceeds *first* upon the existence of the fact that such franchises are *property* and *second* upon a denial of the existence of legislative power to *destroy* property; and the able argument is not only supported in reason and logic but by the authority of the Courts both Federal and State.

"If it is possible," says the Court, (page 51), "to conceive the idea of a repealable grant certainly such a grant, accompanied with power to convey or pledge the interests granted, must on the execution of the power, *necessarily preclude a resumption by the grantor of the subject of the grant or any right of property acquired under it.* An express reservation by the legislature of

power to take away or destroy property lawfully acquired or *created* would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly, would be equally ineffectual and void."

Greenwood vs. Freight Co., 105 U. S., 13, has been referred to as not being in harmony with the contention that a repeal of a charter of a corporation does not carry with it the destruction of a franchise granted to the corporation, but Mr. Justice Miller says in that case:

"Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal, and the Courts may, if the legislature does not provide some special remedy, enforce such rights by the means in their power. The rights of the shareholders of such corporations to their interests in its property are not annihilated by such a repeal and there must remain in the courts the power to protect these rights."

It was further held that, so far as the law then under consideration authorized one corporation to take and use the property or franchises of another, it was sustainable under the provisions requiring compensation to be made therefor under the power of eminent domain.

But this subject need not be further pursued because there has been no repeal of the plaintiff's charter and no power is reserved to revoke a franchise unless by a re-

peal of the charter under which it is held. We think also that it must be held, in view of the decisions of the Court of last resort in New York, that no power is reserved by the Constitution or laws of New York to revoke any franchise or special privilege, that no power existed to revoke the franchise in question.

G.

The Court of Appeals of New York has held that Chapter 284 of the Laws of 1894 (ante page 22) contravenes Sec. 10 Art. 1 of the Federal Constitution and is void, (record, folio 227,) but that the remainder of the statute, excepting a part hereinafter referred to, is not open to that objection.

We think we have shown herein that the argument which applies to Chapter 284 of the Laws of 1894 applies with equal force to the entire statute; and we think that the action of the village in doing what it has done in the premises, merits the condemnation of the Court, *only* upon the suggestion that its act was unauthorized.

The conclusion of the Court of Appeals regarding Chapter 284 of the Laws of 1894 is based upon the very evident fact that it provides a method by which the plaintiff may be deprived of its customers. Thus the Court says (fol. 227):

"An attempt to exercise the authority sought to be conferred by this provision of the statute would necessarily deprive a private corporation of all its customers, and, as a result the business of such corporation would be absolutely destroyed, a business which the law assured it at the time of its incorporation should not be interfered with otherwise than by competition."

But in the *Walla Walla* case, frequently cited herein, this Court says:

"If the city were allowed to erect and maintain competing water works, the value of those of the plaintiff would be materially impaired if not *practically destroyed*. The city might fix such price as it chose for its water and might even furnish it free of charge to its citizens and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit and the citizens would naturally take their water where they could procure it cheapest. The plaintiff on the other hand must carry on its business at a profit or its investment becomes a total loss."

It is thus seen that this court supplies the same reason for invalidating the whole law, or at least a greater part of it, which the Court of Appeals supplied for invalidating Chapter 284 of the Laws of 1894.

And it seems clear, that if the law of 1894 was void as "impairing the obligation of contracts," the whole statute must be void also for precisely the same reason, for, as the Court of Appeals says, "the law assured the plaintiff at the time of its incorporation that its business

should not be interfered with otherwise than by competition."

"To hold that one of the powers the legislature has placed in the hands of the village, by which the plaintiff has been partially destroyed, is unconstitutional, avails nothing, when others, equally potent, are allowed to stand, to the utter destruction of the old company."
Dissenting opinion, fol. 233.

The Court of Appeals saves the act of the village, by eliminating the act of 1894, and, if we understand it, by eliminating the power sought to be conferred, of taxing the plaintiffs' property for the construction and maintenance of defendant's water works, (fol. 228) but it does not allude to the power which exists to tax the inhabitants of the village for deficiencies which this Court in the *Walla Walla* case shows, is equally if not more destructive of the property of the plaintiff.

Neither is the reason assigned by the learned Chief Judge of the Court of Appeals for eliminating the evil in the statute, to the intent that the remainder may be saved, a good one. It is not the fact that many municipalities have constructed independent water works under this statute where private companies have been employed to render the public service, but on the contrary there are many private companies now engaged in supplying municipalities, whose properties are to be destroyed, if such acts are to be upheld by the courts. Destroyed *wantonly*, because the municipalities taking them *at their worth*, can never be losers.

It is difficult to see precisely what the Court of Appeals means when it says (fol. 228) "Neither is it an essential part of the scheme that the plaintiff's property should be taxed to pay for the construction and maintenance of the defendants' water works. Abundant resources are provided for the working out of the plan for paying for the property and the cost of its operation without assessing the property of the plaintiff for such purposes."

Assuming this to be so, it is a matter of minor importance to the power which confers upon the Board of Water Commissioners authority to establish rates and the power to assess the inhabitants generally, including the plaintiff, to make up all the deficiencies. But how is the plaintiff's property to be exempted from taxation to construct and maintain the defendants' system, *under the act of 1875?* Under that act, before anything can be done, the voters and electors (plaintiff excluded) must meet and vote in favor of the necessary taxes. Having done this such taxes as are necessary must be assessed on all the real and personal property in the village including the property of the plaintiff.

But if the Court of Appeals means that taxation may be avoided, by an issue of municipal bonds and the collection of an adequate revenue for their payment, it loses sight of the fact that such adequate revenue must be obtained at the expense of the private corporation, and in the process of its final destruction, *under the*

standing threat of taxation for deficiencies in the event of an inadequate revenue. Hence while it may be true (though we do not see how it is possible that it can be) that, "abundant resources are provided for the working out of the plan for paying for the property and the cost of its operation without assessing the property of the plaintiff," *the principal resource is the ever standing threat of taxation for deficiencies, a much more "ingenious and effective device to deprive the plaintiff of its customers" than Chapter 284 of the Laws of 1894 and a device, too, which is necessary, if not inherent in the power to construct, maintain and operate a system of municipal water works.*

II.

THE ACT OF THE DEFENDANT CORPORATION UNDER CHAPTER 181 OF THE LAWS OF 1875, VIOLATED SEC. 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT WAS AN ACT OF THE STATE DEPRIVING PLAINTIFF OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

The act complained of, although the act of the village, was also the act of the State, in that it was the act of a political sub-division of the State, under the delegated authority of its Legislature. The restriction is on *every branch* of government. The prohibitions "refer to all

the instrumentalities of the State, to its legislative, executive and judicial authorities; and, therefore, whoever by virtue of a public position under State government deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name of and for the State *and is clothed with the State's power, his act is that of the State.* This must be so, or, as we have often said, the constitutional prohibition has no meaning."

Chicago Etc. R. Co. vs. Chicago, 166 U. S., 226.

The act we are complaining of here is the act of the defendant corporation under the State's delegated power.

Corporations are protected equally with natural persons.

Smyth vs. Ames, 169 U. S., 466.

Covington Etc. Turnpike Road vs. Sandford, 164 U. S., 578.

The *property* of the plaintiff, when, in 1896, under delegated authority, the defendant village organized a board of water commissioners, consisted *first*, of its *franchise*.

Gulf and Ship Island R. Co. vs. Hewes, 22 Sup. Court Reporter, 26, 30.

Such franchise was not the exclusive privilege of sup-

plying the *village* and its *inhabitants* with water, but it was the privilege of supplying the village and its inhabitants *on equal terms with all other corporations and individuals*. This right or privilege of *equality* in the service to be rendered was an "essential attribute" of the plaintiff's property and to deprive one of an essential attribute of his property without due process of law is as much within the constitutional inhibition as depriving him of the property itself.

So in *Matter of Jacobs*, 98 N. Y., 98, Judge Earl says, that this constitutional guaranty "may be violated without the physical taking of property for public or private use. Property may be destroyed or its value may be annihilated: it is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it, or *its value*, or any of its *essential attributes* deprives the owner of his property."

In *Pumpelly vs. Green Bay Co.*, 18 Wall., 166, 167, Judge Miller says: "There may be such serious interruption to the common and necessary *use of property* as will be equivalent to a taking within the meaning of the Constitution."

In *Wynehamer vs. People*, 13 N. Y., 378-398, Judge Comstock says: "When the law annihilates the value of

property and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision intended expressly to shield personal rights from the exercise of arbitrary power."

In *People vs. Otis*, 90 N. Y., 48-52, Judge Andrews says: "Depriving an owner of property of one of its attributes is depriving him of his property within the constitutional provision."

See also

State vs. Julow, 129 Mo., 163.
Janesville vs. Carpenter, 77 Wis., 288.

If it be true then, as above stated, that the plaintiff's franchise was the privilege of supplying the village and its inhabitants *on equal terms with all other corporations and individuals*, it is insisted that it has been absolutely and completely deprived of this attribute of its property by the act of the defendant.

Doubtless this brings us back again to the question, is the defendant corporation in operating a system of water works the *mere competitor* of the plaintiff? For if it is not, but the destroyer of the plaintiff, then the plaintiff is deprived of this attribute of its property, without due process of law.

An attribute of the franchise was the privilege of supplying the village.

The question turns in part upon a consideration of the question whether the laws operate on the plaintiff and defendant *alike*.

Duncan vs. Missouri, 152 U. S., 377.
Giozza vs. Tiernan, 148 U. S., 657.
Leeper vs. Texas, 139 U. S., 462.
Hurtado vs. California, 110 U. S., 516, 535.

And whether the plaintiff is exempted from the exercise of the unequal or arbitrary power of the government, (See cases last above cited and)

Dent vs. West Virginia, 129 U. S., 114-124.
Caldwell vs. Texas, 137 U. S., 692, &c.

Judge Story (Story's Const., §1935) defines the guaranty of due process of law as securing "the right to be protected in life and liberty and in the acquisition of property under equal and impartial laws which govern the whole community."

It is therefore insisted that such cases as *Charles River Bridge vs. Warren Bridge*, *Turnpike Company vs. State*, *Syracuse Water Company vs. City of Syracuse*, and *the Central City Water Company*, &c., have no application whatever to this case. Neither the Warren Bridge Company, nor the Central City Water Company, nor the Railroad Company sought to be restrained in *Turnpike Company vs. State*, possessed the power, (possessed by defendant in this case) to take the property of the other corporation, both by the power of eminent do-

main and taxation. Neither of such companies sought to be restrained, possessed the power to levy taxes upon the customers of the other corporation to make good deficiencies in revenue, due to inadequate rates of charges for services rendered.

What, we ask, would have been thought of legislation in the *Charles River Bridge* case, if instead of simply granting to the Warren Bridge Company a franchise to construct another bridge, it had given the Warren Bridge Company power to tax the Charles River Bridge Company to construct and maintain its own bridge? Of a law which provided that out of the tolls of the Charles River Bridge Company a percentage, to be fixed by the Warren Bridge Company, should be paid annually to the Warren Bridge Company? What would be said of legislation conferring upon the Warren Bridge Company power to tax the people of the whole State of Massachusetts to support its bridge, to enable it to maintain its competition with the Charles River Bridge Company? Not only to enable it to *maintain its competition*, but to *destroy* its adversary?

So in the case of the Syracuse Water Company vs. The City of Syracuse, the questions suggested are, what if the legislature, or the City of Syracuse under authority of the legislature, had granted to the Central City Water Company, power to tax the Syracuse Water Company to construct its own plant and thereafter to tax it annually for its support and maintenance? What if the

legislature, or the city, had given to the Central City Water Company, power to tax the people of the whole city to enable it to maintain competition with the old company, and so ultimately to destroy it absolutely and completely?

The provision of the Federal Constitution herein appealed to, says Earl, Judge, in *Stuart vs. Palmer*, 74 N. Y., 183, "is founded on natural justice." When the provision was new to the Constitution, Chief Justice Waite, in *Munn vs. Illinois*, 94 U. S., 113, said it was "old as a principle of civilized government." In *Barton vs. Platter*, 10 U. S. App., 657, the Court says: "Every disregard of this principle by Courts, legislatures or citizens tends directly toward distrust, insecurity, disorder and anarchy." So, as we have seen, it is intended to secure the individual from the arbitrary exercise of the power of government and to protect property from confiscation, destruction and impairment.

So, in view of what this Court says in the *Walla Walla* case that "if the city were allowed to erect and maintain competing water works the value of those of the plaintiff company would be materially impaired if not practically destroyed," and of what the highest court in Pennsylvania says to the effect that when the Borough and the private corporation seek to render the same service, the plant of the private corporation must be abandoned, and of what the Court of Appeals in this case

says that the act of the village was "an unconscionable performance" repugnant to common fairness if not common honesty, may we not maintain, as we do, that the act of the village was an arbitrary exercise of power and violative of the clause of the Federal Constitution invoked herein?

In *Davidson vs. New Orleans*, 96 U. S., 97, Mr. Justice Bradley said: "I think, therefore, we are entitled under the Fourteenth Amendment not only to see that there is some process of law, but 'due process of law' provided by the State law where a citizen is deprived of his property; and that in judging what is due process of law respect must be had to the cause and object of the taking,—whether under the *taxing* power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case it will be adjudged to be 'due process of law,' *but if found to be arbitrary, oppressive and unjust it may be declared to be not due process of law.*'"

"Due process of law" does not mean merely an act of the legislature. As the court in Dorman vs. State, 34 Ala., 216, well said: "if life, liberty and property could be taken away by the direct operation of a statute the enjoyment of these rights would depend upon the will and caprice of the legislature and the provision would be a mere nullity. Thus construed the constitution would read, 'no person shall be deprived of his life, liberty or property unless the 'legislature pass a law to do so.'"

In efforts to discover the weaknesses, if any, which exist in our arguments, we have asked ourselves searching questions, some of which, may, perhaps, occur to this Court. For instance, conceding for the sake of the argument that, after the plaintiff had constructed its plant, the defendant, and every inhabitant of the defendant, had the right to decline the services which plaintiff was prepared to perform and that the defendant and most of its inhabitants now decline such services,—the question is asked if the plaintiff, notwithstanding, does not still possess the same privilege which was granted to it, i. e., the privilege of supplying both the village and the inhabitants, if it can get them to do business with it?

This question cannot be answered in the affirmative. It cannot be said that when the village had made itself wholly independent of the plaintiff's services that plaintiff's privilege remained; that when, by its own act, for the very purpose that it might not be compelled to take its supplies from the plaintiff, it constructed its own plant, it cannot be said that plaintiff still retained its privilege. The plaintiff's privilege was to supply a municipality *in need of a supply* from some source. The privilege of supplying a *possible* consumer, a possible *taker* of the plaintiff, or of *some rival*. When it constructed its own plant, it asked no one to supply it, it ceased to be a possible consumer, it was no longer a possible taker of the plaintiff or of any rival of the plaintiff.

The only way we can get this village to do business

with us is to place it back where it was before it constructed its own plant. That is it must again be placed *in need of a supply* and made a *possible consumer*. The privilege of supplying a village in need of no supply is a nullity, a privilege impossible of execution.

So, as to the inhabitants, we no longer have the privilege of supplying them. The privilege of supplying them, to be such, must be one *on equal terms* with any and every other individual or corporation. *To say we have the privilege of supplying the inhabitants provided we supply them for one-half the rates which the village will supply them for, is not a privilege.* Reserving the right to fix the rates for water, with power to tax the inhabitants for deficiencies, to say nothing of other provisions, alone, deprives the plaintiff of supplying the inhabitants. So if there was no such reservation, the interest which every inhabitant has in the success of a municipal system,—the *pecuniary* interest,—deprives the plaintiff of the privilege of supplying the inhabitants. Such is the natural and necessary result of the act of the plaintiff.

But it is further asked, "Suppose the village water works should break down and it (the village) should come to the plaintiff again, will it not have all the power to supply, that it had before?"

That may be, but assuming it to be the fact, it does not show that the plaintiff has the *existing* privilege or

power. It must wait until it does break down,—which in and of itself shows that while the village plant *exists*, the plaintiff's privilege and power is gone, does *not* exist.

It is simply the same thing as saying, that if the defendant had never constructed its system, then the plaintiff would have the power and privilege of supplying it. So it is the same thing as saying, that if the plaintiff succeeds in this action and obtains its injunction, it will then have again what it was granted, the privilege and power of supplying the defendant and its inhabitants, but which, the village, by its act, has taken away.

The act of the village is an act of the State, therefore, depriving the plaintiff of its property; of its franchise; of its attributes; of its privileges; of its customers and it does this without process of law.

III.

IF PLAINTIFF AND DEFENDANT ARE, ALIKE, BUSINESS CORPORATIONS AND COMPETITORS FOR THE SAME BUSINESS, (WHICH WE DO NOT CONCEDE) THE ACT OF DEFENDANT VILLAGE CANNOT BE SUSTAINED FOR THE REASON THAT IT CONTRAVENES SEC. 1 OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION AND "DENIES" TO THE PLAINTIFF "THE EQUAL PROTECTION OF THE LAWS."

The only cases to be found, (including this case in the Court of Appeals,) which seem to uphold a municipality under the circumstances of this case, are those in which it is asserted that the municipality is nothing in the world but the competitor, on equal terms, of the private company.

Denying that they are such competitors, we are now contending, that, if they are, they are not equally protected by the laws; that the act of 1875 (Chapter 181,) with its amendments, discriminates against the plaintiff as the mere competitor of the defendant.

"Yes," the Court of Appeals says, that is the fact as to Chapter 284 of the Laws of 1894, because "it is a device" than which "it would be difficult to conceive one more ingenious and effective to deprive plaintiff of its customers."

So it *seems* to say the same of the power of defendant to tax the plaintiff's property for the construction and maintenance of its own plant. (Fol. 228). Although it says it in such an indecisive way that the plaintiff has not ventured to rely upon it, but has paid the taxes which the defendant has assessed against it, since the decision was rendered.

But of the power of the village authorities to establish rates and to tax the inhabitants for deficiencies, which is a device even more potent for the same purpose, than the one so strongly condemned, it says nothing.

It is to be observed, (and this observation relates to each of the preceding points) that Section 16 of the Act of 1875, was materially enlarged by Chapter 527 of the Laws of 1890, passed *after* the plaintiff had constructed its works. (Ante page 21-22).

The provision appealed to relates as well to corporations as to natural persons.

Minneapolis etc. R. Co. vs. Beckwith, 129 U. S., 26.

Home Ins. Co. vs. New York, 134 U. S., 594, etc., etc.

So the citation in our next preceding point from *Chicago etc. R. Co. vs. Chicago*, 166 U. S., 226, applies as well to the provision of the Constitution now invoked as to the provision then under consideration.

And it is a denial of the equal protection of the *laws to discriminate in legislation between different corporations and natural persons engaged in the same business.*

Louisville, etc., R. Co. vs. Railroad Com'rs., 19 Fed. Rep., 679.

San Mateo County vs. Southern Pac. R. R. Co., 13 Fed. Rep., 733.

If the Court shall hold that the plaintiff and defendant corporations are simply and only competitors it must find that they are placed upon an equal footing so that the ability of neither to compete is abridged or infringed upon by the other.

We submit that such an equality cannot be found because it does not exist. On the contrary we find as follows:

1. The defendant possesses the power of eminent domain and may take the property of the plaintiff at any time. The plaintiff possesses no such power.

2. The defendant both in the construction and maintenance of its plant is given power and authority to tax the property of the plaintiff, but the plaintiff to construct or maintain its own plant has no power to tax the property of the defendant.

3. The defendant is given power to compel the plaintiff to furnish to it and to its inhabitants pure and wholesome water "at reasonable rates and cost." In other words it has power to fix the rates of charges of the plaintiff, but the plaintiff has no such power over the defendant.

4. The defendant has power to fix its own rates of charges to the inhabitants of the village, who are, excepting the village itself, its only possible customers, and if such charges are insufficient to maintain its plant it has power to compel such inhabitants to make up all deficiencies. The plaintiff is given no such power.

5. It has power to become and does become the patron of its own plant, and for such sum as it agrees to pay, it possesses the power to compel the plaintiff to pay its portion, as one of the taxpayers of the village.

Finally the defendant possesses the power which, as this Court in the *Walla Walla* case says, enables it to "materially impair" if not to "practically destroy" its competitor. Of course the plaintiff has no such power. Again it possesses a power which according to the Supreme Court of Pennsylvania in *White vs. Meadville*, enables it to compel the plaintiff to abandon its property. The plaintiff possesses no such power. Again it possesses a power which, when it undertakes to exert it, the Court of Appeals of New York, must needs pronounce it "an unconscionable performance." The plaintiff is not given *that* power.

Does the State of New York then, place these two *persons*, as competitors, on an equality?

The Court of Appeals eliminates the act of 1894, possibly the power of defendant to tax the plaintiff, and so undertakes to *make equality*. So this Court may say the power of the defendant to fix rates and levy taxes for deficiencies, may be eliminated, with further intent to save the act of the village from judicial condemnation.

But it cannot do that, because the power to construct, maintain and operate water works as a business, conferred upon a village, carries with it, of necessity, without express authority, the same powers. That is, the village, if authorized as a business corporation, to construct and maintain water works, is given power "to do

all acts that may be necessary to enable it to exercise the powers expressly conferred and to accomplish the objects intended to be accomplished." (See Ante Point I, and authorities).

That is to say, as it takes money to build, an authority conferred to build, implies authority to raise the necessary money by taxation; and so as to maintenance and operation, if revenues shall prove insufficient, authority to carry on the business also confers authority to fix rates for service and to collect the same.

So that from and out of the mere grant of the right to a village corporation, to construct and maintain and operate a system of water works, arises the exclusive character of its power. Such power cannot be gotten rid of by eliminating portions of a statute expressly conferring it, for it will still remain after the courts shall have done their best or their worst.

So again if this is to be a process of elimination to make the two corporations equal to save the defendants' act, it cannot end with the act of 1875 and must go back to the act of 1873 which subjects the private corporation to the control of the municipal corporation.

The Court of Appeals says "abundant resources are provided for the working out of the plan for paying for the property and the cost of its operation without assessing the property of the plaintiff for such purposes." If

that means that the works can be built and operated upon bonds, which in time can be paid by revenues to be derived, it substitutes for taxation, the acquisition of the plaintiff's patrons under the threat of their taxation for deficiencies which is only something worse. But so far as we are considering the application of the provision of the Constitution invoked to the case in hand, it makes no difference whether the works are built on the proceeds of taxation or upon the bonds of the municipality, because all the real and personal property of the village, including that of the plaintiff, is *pledged* as security for the payment of the bonds. That is, while it may be that the works can be constructed without directly taxing the plaintiff, they cannot be, without a pledge of the plaintiff's property, and that in the application of this provision of the Constitution, is no more equal than would be direct taxation.

Let us assume that the village instead of becoming itself the *alleged* competitor, had granted to another private corporation a franchise to construct, maintain and operate a system of water works under the delegated authority of the legislature, and that under the same authority it had conferred upon such second corporation all the powers over the first and over the possible and existing patrons of the first, which the statute in this case confers upon the defendant; power to tax, power to condemn, power to regulate charges, power to tax the inhabitants for deficiencies, etc., etc., would the judiciary

uphold the second franchise as being free from condemnation under this provision of the Constitution?

If the defendant, under delegated power of the legislature, will confer upon this plaintiff the power, alone, to fix its own rates, with power to tax the inhabitants of the village to make good its deficiencies, the same power which the defendant has, we will venture to say that plaintiff will keep right on with its business at the old stand, notwithstanding all the other inequalities enacted by the statute and which must necessarily grow out of the relations which exist between the parties as business competitors.

IV.

THE STATUTE UNDER WHICH THE DEFENDANT ACTED OR THE ACT OF THE DEFENDANT, WHICH THE STATUTE AUTHORIZED, WAS VIOLATIVE OF THE FEDERAL CONSTITUTION, IN THAT IT WAS ONE WHICH ENABLED THE DEFENDANT TO TAKE, AND WHICH DID TAKE IN FACT, THE PRIVATE PROPERTY OF THE PLAINTIFF, FOR A PUBLIC USE, WITHOUT COMPENSATION.

It is to a certain extent the fact, that the force of the contentions herein made, turn largely upon the question, whether, under the circumstances of the case, the defendant was, or could be, the competitor, and no more, of the

defendant; and the different propositions of this argument are designed to show in part how impossible it is to contend that it is or could be such a mere competitor; and so it is insisted that the statute in its operation, *and by force of its operation*, was one which took the property of the plaintiff, without compensation.

First. All that it took and has taken from the plaintiff *in taxes* to build and maintain its plant, has been a taking of private property without compensation.

The government may take property in two ways, by taxation and by the power of eminent domain, and whether it is taken by one or the other power, does not depend upon the name which a statute gives to the act which confers the power but upon the character of the act.

In the consideration of this subject, therefore, it becomes important to consider the distinction which clearly exists between the power of eminent domain and of taxation.

In *People vs. Mayor, etc., of Brooklyn*, 4 N. Y., 419-424, Judge Ruggles, very clearly stated this distinction, as follows:

"Taxation exacts money, or services, from individuals as and for their respective shares of contribution to any public burden.

"Private property taken for a public use, by right of eminent domain, is taken, not as the owners share of contribution to a public burthen, but as so much beyond his share."

"Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty and creates no obligation to repay otherwise than in the proper application of the tax.

"Taxation operates upon a community or upon a class of persons in a community and by some rule of apportionment. The exercise of the right of eminent domain, operates upon an individual and without reference to the amount or value exacted from any other individual or class of individuals."

So, as the learned Judge elsewhere says taxation rests upon the maxim, that "he who receives the advantage ought to sustain the burthen."

If we apply these distinctions they show, that under this act, the property taken under the guise of taxes is taken under the exercise of the power of eminent domain and not under the power of taxation.

Every dollar required by this company, or which the statute requires it to pay, for the construction of the vil-

lage plant, is so much *beyond its share*, because it manifestly obtains no advantage or benefit from the distribution of the tax. On the contrary it is used not for its benefit in any degree, but for its destruction. It does not share with the rest of the community in the public benefit. It receives no protection from the tax and *can* receive none. As the public gives nothing back to this private company, *it is a debtor to it for the* property which it takes. No *duty* required this company to surrender any of its property by way of taxation to construct the village plant.

The provision of the constitution is that private property shall "not be taken for public use without compensation." The idea is that whenever *any* property is taken, personal property, easements, lands, the owner must receive compensation. If he does not receive compensation through the distribution of taxes, as *one of a class* benefited, when it is taken from him in the *form* of taxation, then he must receive it as for property taken under the exercise of the power of eminent domain.

What benefit could have been received by the private company here, for the tax assessed and collected? What benefit which was shared between it and others of a class? What advantage did it receive for the burden imposed upon it?

If the village plant could have been rendered subject to taxation, it would have availed nothing, in the direc-

tion of suggesting a mere competitor, because in that case it would be simply taking money out of one pocket and putting it into another.

But the taking of property by the "strong arm," is not confined, in this case to the property taken, in the name of, and under the guise, of taxation.

The plaintiff had been in operation a little over five years, when the village began to legislate for itself on this subject. It had then obtained, we will say, for the purposes of this case, something like two hundred and fifty patrons, all content with the service rendered. These patrons constituted its property,—for in such a case, where a corporation's sole resource is the existence of its patrons, in its ability to use to advantage and profit, the tangible property which it possesses, such patrons *obtained*, constitute its property.

And if such patrons are taken away, *by force of the operation of a statute*, put in motion by the local government whose purpose is to obtain such patrons for itself, the statute surely merits judicial condemnation as one which authorizes the taking of private property for a public use without compensation; while the act, pursuant to the statute, merits the like condemnation for the reason that it actually takes such property without compensation.

We believe we are entitled to go further and to claim

that the village itself as a patron, or even as a possible patron, was property of the plaintiff under the circumstances of this case. It constructed its works when the village was, *as matter of law*, in need of being supplied. Its purpose was to supply the village. For that reason it established hydrants, otherwise without use. But by operation of the law, which the *village itself made* "the law of the State," the plaintiff was deprived of its right to consider the defendant even a possible patron. In other words, it was deprived of its franchise, the privilege which had been granted to it of supplying the defendant, *which was its property.*

Gulf and Ship Island R. Co. vs. Hewes, 22 Supreme Court Reporter, 26, and authorities, page 30.

In the State of New York such *franchises* have recently become taxable as property, and under the statutes of New York the plaintiff's *franchise*, as such, has been taxed by the defendant corporation.

The argument here urged not only supports our proposition but further shows how impossible it is to contend that the defendant acting under "the law of the State," of which we complain, can be the competitor, the rival, *only*, of the plaintiff.

V.

THE ULTIMATE QUESTION TO BE DECIDED HERE, WE MAY SAY, IS WHETHER THE PLAINTIFF'S PROPERTY AND RIGHTS AND THE FIFTY THOUSAND DOLLARS' WORTH OF BONDS WHICH IT HAS SOLD AND WHICH WERE PURCHASED AND ARE NOW OWNED BY THIRD PARTIES, ARE TO BE RENDERED WORTHLESS, OR WHETHER THE VILLAGE SHALL CEASE TO OPERATE THE PLANT WHICH IT CONSTRUCTED, AFTER THIS LITIGATION BEGAN AND IN DEFIANCE OF IT.

And we find at last, if the plaintiff is to fail, *a law of a State*, under which property "lawfully acquired," may be and must be, LAWFULLY destroyed.

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